FILED
JUL 7 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956
No. 243

GEORGE E. SHIBLEY,

Petitioner,

vs.

UNITED STATES OF AMERICA.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

MORRIS LAVINE,
215 West Seventh Street,
Los Angeles 14, California,
DANIEL G. MARSHALL,
4041 Marlton Avenue,
Los Angeles 8, California,
A. L. WIRIN,
257 South Spring Street,
Los Angeles 12, California,
SAM ROSENWEIN,
414 South Niagara Street,
Burbank, California,
Attorneys for Petitioner.

JOSEPH A. BALL,
120 Linden Avenue,
Long Beach 2, California,
WALTER ELY,
900 Wilshire Boulevard,
Los Angeles 17, California,
GEORGE CHULA,
800 North Broadway,
Santa Ana, California,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

PAGE

Opinion below 1

Jurisdiction 1

Questions presented 2

Constitutional provisions and statutes involved 3

Statement of the case 4

Introduction 4

The retention of petitioner as counsel 7

Proceedings of the Court of Inquiry 8

The indictment and trial 12

Supression of evidence by prosecution and motion for new trial on newly discovered evidence 22

Argument and reasons relied upon for granting the writ 31

I.

The courts below erroneously construed and applied 18 U. S. C. 641, the General Conspiracy Statute, the Uniform Code of Military Justice and the Rules and Regulations thereunder by refusing to permit petitioner to prove that he had no reason or motive for appropriating the office copy of the transcript of the Court of Inquiry and by prejudging the issue in instructions to the jury and refusals to instruct, with the resultant deprivation of petitioner's liberty without due process of law in violation of the Fifth Amendment 31

II.

Failure to grant a motion for new trial after an undenied showing that the prosecution had suppressed the evidence of an essential witness and that the newly discovered evidence clearly exculpated the petitioner was a denial of justice, a manifest abuse of discretion and a deprivation of petitioner's liberty without due process of law in violation of the Constitution 41

PAGE

III.

Measured by standards involving the constitutional rights of citizens and the rights and duties of civilian counsel, the evidence herein was neither competent nor substantial to sufficiently support the verdict, and the judgment of conviction thereon deprived petitioner of his liberty without due process of law 48

IV.

The sentence of three years imprisonment imposed upon petitioner on the conspiracy count was illegal 55

V.

18 U. S. C. 13, the Assimilative Crimes Statute, inherently and as construed and applied herein, violates the due process provision of the Fifth Amendment, creates an unequal application of the crminal laws in the different states and territories and invades the reserved powers of the States in violation of the Tenth Amendment to the Constitution of the United States 58

VI.

The conviction of petitioner principally upon the testimony of an adjudicated insane witness, the failure of the court to instruct the jury as to the weight and credibility to be given the testimony of an adjudicated insane witness, the coercion of the jury's verdict and the exclusion by the trial court of testimony as to the reputation of an adjudicated insane witness, substantially affected petitioner's right to a fair trial and deprived petitioner of his liability without due process of law 61

Conclusion 62

Appendices:

Appendix A. Opinion of the United States Court of Appeals for the Ninth Circuit ..... App. p. 1

Appendix B. Judgment of the United States Court of Appeals for the Ninth Circuit ..... App. p. 15

Appendix C. Constitutional and statutory provisions involved ..... App. p. 16

TABLE OF AUTHORITIES CITED

CASES	PAGE
Arbuckle v. United States, 146 F. 2d 657	41
Baumgartner v. United States, 322 U. S. 665	47, 48
Benton v. United States, 188 F. 2d 625	41, 42
Berger v. United States, 295 U. S. 78	43, 45
Berkovitz v. United States, 213 F. 2d 468	35
Bollenbach v. United States, 326 U. S. 607	35
Bridges v. Wixon, 326 U. S. 135	52
Buchanan v. United States, 233 Fed. 257	35
Burton v. United States, 196 U. S. 283	13
Burton v. United States, 202 U. S. 344	60
Cammer v. United States, 350 U. S. 399	50
Chambers v. Florida, 309 U. S. 227	47
Chinese Exclusion case, 130 U. S. 581	60
Coates v. United States, 174 F. 2d 959	41
Communist Party v. Subversive Activities Control Board, 76 S. Ct. 663	43
Curtis, Ex parte, 106 U. S. 371	60
Dahly v. United States, 50 F. 2d 37	52
Dynes v. Hoover, 20 How. (U. S.) 65	39
Frank v. United States, 220 F. 2d 559	35
Gillette v. United States, 236 Fed. 215	52
Gordon v. United States, 344 U. S. 414	51
Griffin v. United States, 336 U. S. 704	41, 42, 44
Grimley, In re, 137 U. S. 147	39
Haigler v. United States, 172 F. 2d 986	35
Hamilton v. United States, 140 F. 2d 679	41
Hartzel v. United States, 322 U. S. 680	54
Heindel v. United States, 150 F. 2d 493	35
Hiatt v. Brown, 339 U. S. 103	39
Hoffman v. United States, 341 U. S. 479	40

PAGE

Hyde v. United States, 15 F. 2d 816 35
Johnke v. State, 68 Neb. 154 104 N. W. 154 52
Klapprott v. United States, 335 U. S. 601 53
Kotteakos v. United States, 328 U. S. 750 33
Krulewitch v. United States, 336 U. S. 440 32
Martin v. Hunter, 1 Wheat. 304, 4 U. S. (L. Ed.) 97 60
McCulloch v. Maryland, 4 Wheat. 316, 4 U. S. (L. Ed.) 579 60
McNabb v. United States, 318 U. S. 332 ..... 43, 47
Miller v. United States, 120 F. 2d 968 33
Mills v. United States, 228 F. 2d 645 52
Mooney v. Holohan, 294 U. S. 103 43
Morrissette v. United States, 342 U. S. 246 ..... 2, 20, 31, 32, 34, 40
Mortenson v. United States, 322 U. S. 369 48
National Labor Relations Board v. Columbian Enameling & Stamping Co., 306 U. S. 292 53
Neagle, In re, 135 U. S. 1 60
Norcott v. United States, 65 F. 2d 913 34
Offutt v. United States, 348 U. S. 11 50
Pettine v. Territory of New Mexico, 201 Fed. 489 41
Potter v. United States, 155 U. S. 438 ..... 32, 33
Pyle v. Kansas, 317 U. S. 213 43
Remmer v. United States, 350 U. S. 377 47
Screws v. United States, 325 U. S. 91 ..... 32, 52
Spurr v. United States, 174 U. S. 728 32
Stromberg v. California, 283 U. S. 359 58
Sykes v. United States, 204 Fed. 909 52
Toth v. Quarles, 350 U. S. 11 36
Union Bridge Co. v. United States, 204 U. S. 364 59
United States v. American Precision Products Corp., 115 Fed. Supp. 823 56
United States v. Bennette, 9 Court-Martials Rep. (CMR) 600 .. 8

PAGE

United States v. Bucur, 194 F. 2d 297 33
United States v. Di Re, 332 U. S. 581 54
United States v. Falcone, 311 U. S. 205 54
United States v. Haderlein, 118 Fed. Supp. 346 52
United States v. Matot, 146 F. 2d 197 33
United States v. Praeger, 149 Fed. 474 39
United States v. Shibley, 112 Fed. Supp. 734 10
United States v. Silva, 131 F. 2d 247 54
United States v. Wainer, 170 F. 2d 603 ..... 53, 54
United States v. Wicoff, 187 F. 2d 886 35
Viereck v. United States, 318 U. S. 236 52
Wayman v. Southard, 10 Wheat. 1, 6 U. S. 253 59
Williams v. Kaiser, 323 U. S. 471 47
Yamashita, In re, 327 U. S. 1 39
Young v. United States, 48 F. 2d 27 56

RULES

Federal Rules of Civil Procedure, Rule 33 42
Federal Rules of Criminal Procedure, Rule 42(a) 11

STATUTES

California Penal Code, Sec. 459 ..... 12, 56
California Penal Code, Sec. 460 ..... 12, 56
United States Code, Title 18, Sec. 7 12
United States Code, Title 18, Sec. 13 ..... 3, 12, 56
United States Code, Title 18, Sec. 14 59
United States Code, Title 18, Sec. 371 ..... 2, 3, 12, 13, 30, 55
United States Code, Title 18, Sec. 641 ..... 2, 12, 13, 20, 30, 31, 34, 55, 57
United States Code, Title 28, Sec. 1254(1) 1
United States Code, Title 50, Sec. 551 37
United States Code, Title 50, Sec. 591 49

PAGE

United States Code, Title 50, Sec. 592 37
United States Code, Title 50, Sec. 602 10
United States Code, Title 50, Sec. 603(b) 7
United States Code, Title 50, Sec. 612 49
United States Code, Title 50, Sec. 613 49
United States Code, Title 50, Sec. 622 10
United States Code, Title 50, Sec. 629(c) 38
United States Code, Title 50, Sec. 731 ..... 7, 36, 37
United States Code, Title 50, Sec. 731(b) 8
United States Code, Title 50, Sec. 731(c) 9
United States Code, Title 50, Sec. 731(d) 10, 39
United States Constitution, Fifth Amendment 3, 59
United States Constitution, Tenth Amendment 3, 60

MISCELLANEOUS

11 American Jurisprudence, Sec. 4 56
35 Cornell Law Quarterly (1949), pp. 151, 158, Keefe and Moskin, Codified Military Justice 50
Davis, Military Law of the United States (1915), pp. 218-21 36
3 Digest of Opinions (July-Sept., 1953), The Judge Advocates General of the Armed Forces, p. 96 8
Everett, Military Justice in the Armed Forces of the United States (1956), pp. 149-152 50
Federal Register (Dec. 12, 1951), pp. 12504-5 38
Manual for Courts-Martial of the United States (1951, Naval Supp.), p. 35, par. 0309 37
Manual for Courts-Martial, 1951 (MCM), p. 285 10
1 Marine Corps Manual, par. 15250 7
Military Law and Precedents (1920), pp. 522, 528 9
11 Opinions of Attorney General (1865), p. 137 38
Snedeker, Military Justice Under the Uniform Code (1953), pp. 211-214 36

PAGE

Snedeker, Military Justice Under the Uniform Code (1953), p. 404, et seq 39
Snedeker, Military Justice Under the Uniform Code (1953), p. 411 38
Stern & Gressman, Supreme Court Practice (2d Ed., 1954), pp. 128-30 47
The Manual for Courts-Martial, Sec. 82(g), p. 135 37
United States Code Congressional Service (1950), p. 2225 49
1 Wharton's Criminal Evidence (12th Ed.), Sec. 166, p. 324 32
1 Wigmore, Evidence (3rd Ed.), Secs. 118-119 32
2 Wigmore, Evidence (3rd Ed.), Sec. 254 32
Winthrop, Military Law and Precedents (1920), pp. 516-33 ..... 36, 37
Walker, Military Law (1954) p. 137 50

IN THE

Supreme Court of the United States

October Term, 1956

No.....

GEORGE E. SHIBLEY,

Petitioner,

vs.

UNITED STATES OF AMERICA.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The petitioner, George E. Shibley, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on March 19, 1956.

Opinion Below.

The opinion of the court below (App. A) has not yet been officially reported.

Jurisdiction.

The judgment of the Court of Appeals (App. B) was entered on March 19, 1956, and a timely petition for rehearing was denied on May 9, 1956. The time to file this petition for a writ of certiorari was extended to July 7, 1956, by order of Mr. Justice Douglas dated May 28, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented.

1. Whether, contrary to the decision of this Court in *Morrissette v. United States,* 342 U. S. 246 and in conflict with the decisions of other courts of appeal, the courts below erroneously construed 18 U. S. C. 641 and 371 as well as the Uniform Code of Military Justice by instructing the jury as a matter of law that petitioner, civilian counsel for a member of the armed forces, had a motive and reason for arranging to purloin an office copy of a transcript of proceedings of a Marine Corps Court of Inquiry convened to investigate charges made by petitioner against certain Marine Corps officers, and by refusing to permit petitioner to prove by independent evidence that he had no such reason or motive for the commission of the offenses, contrary to the requirements of fair administration of criminal justice in the federal courts and the due process provisions of the Constitution.

2. Whether, upon the uncontradicted showing that prosecuting officials deliberately suppressed evidence favorable to the petitioner, and the production by petitioner of the evidence completely exculpating him from the offenses charged and demonstrating that the charges against petitioner were maliciously contrived, the courts below erroneously denied petitioner's motion for a new trial contrary to the interests of justice, the Federal Rules of Criminal Procedure and the due process provision of the Constitution.

3. Whether, measured by constitutional and legal standards of proof applicable to the circumstances herein,

there was any competent and substantial evidence tending to support the verdict against petitioner and the judgment of conviction hereon.

4. Whether, under 18 U. S. C. 371, the sentence of three years imposed upon petitioner under the conspiracy count of the indictment was illegal and beyond the jurisdiction of the trial court where the proof allegedly showed only a conspiracy to commit misdemeanor offenses punishable only by a maximum term of one year imprisonment.

5. Whether 18 U. S. C. 13, the Assimilative Crimes Statute, inherently and as construed and applied herein, violates the due process provision of the Fifth Amendment, creates an unequal application of the criminal laws in the different states and territories and invades the reserved powers of the states in violation of the Tenth Amendment to the Constitution of the United States.

6. Whether, the conviction of petitioner principally upon the testimony of an adjudicated insane witness, the failure of the court to instruct the jury as to the weight and credibility to be given the testimony of an adjudicated insane witness, the coercion of the jury's verdict and the exclusion by the trial court of testimony as to the reputation of an adjudicated insane witness, substantially affected petitioner's right to a fair trial and deprived petitioner of his liberty without due process of law.

Constitutional Provisions and Statutes Involved.

The pertinent constitutional provisions and statutes involved are set forth in Appendix C.

Statement of the Case.

Introduction.

The case herein raises questions both fundamental and far-reaching in federal criminal law; in the administration of the Uniform Code of Military Justice and the law military; and in the jurisdiction of military courts and authorities over civilian counsel appearing on behalf of persons in the armed forces. The case was described by the trial court as "unusual" [Pr. R. 49],[1] and by the prosecutor as "bizarre" [R. 407]. It was made so by the circumstances out of which the case arose, the nature of the charge and the character of the trial below. In a land which sets civilized standards governing police, military and court proceedings this case presents a shocking example of violation of due process guaranteed by the Fifth Amendment to the United States Constitution.

The petitioner, a member of the Bar of the State of California for two decades, was retained to represent a Marine facing charges of violation of certain military regulations. Petitioner represented his client vigorously and efficiently. In the course of his successful efforts to acquit his client, petitioner, as civilian counsel, made charges of malfeasance against the military officers at the Marine Base where the proceedings were taking place. He incurred, as the record shows, the displeasure and enmity of commanding officials who would not brook such conduct by an independent civilian counsel.

The officer against whom petitioner, on behalf of his client, had leveled charges convened a military court of inquiry, composed of his own subordinate officers, and compelled petitioner to appear before said military body.

---

[1]References designated "R" are to the Reporter's transcript of proceedings. References "Pr. R." are to the Reporter's transcript of the preliminary proceedings. References to the Clerk's transcript of record below are "C. Tr."

The hearings were secret and petitioner was denied the right to counsel. During the proceedings, petitioner was brought forcibly from his law offices to the military base by armed Marines. He was subjected to an harassing interrogation which lasted five days, the sole object of the inquiry being to compel petitioner to retract the charges made against the military officers or to reveal the sources of his information. He declined as an attorney to do either.

Proceedings were then initiated by the military officers seeking to punish petitioner in the federal courts for contempt in refusing to answer the inquiries of the court of inquiry at the military base. This effort proved abortive when a jury acquitted the petitioner after trial.

In the meantime, the military allegedly discovered that an office copy of the transcript of the proceedings of the said court of inquiry was missing. It was then charged that petitioner had arranged to have such copy purloined for his own use and benefit, and proceedings were again initiated in the federal courts charging petitioner, among other things, with "receiving" stolen property and conspiring to so unlawfully "receive." Petitioner, as will be shown hereinafter, never did receive the copy. It was sent on to news columnist Drew Pearson in Washington, D. C. by the chief prosecution witness who admittedly took it and mailed it to Pearson with the help of a former "leg man" for Pearson with whom he was then living. Photographs of the document were sent to petitioner.

The case made against petitioner rested essentially on the testimony of one witness, a mental incompetent and degenerate who admitted that he had taken the copy of the transcript with the knowledge of a Marine corporal

on the base. The witness did not implicate petitioner until about six months after his own conduct had been discovered by the military. He received a suspended sentence after the trial. No proceedings of any kind were instituted by the military or civilian authorities against the corporal. The office copy of the transcript of the proceedings (a seventh copy) was found by the jury to be worth less than $100. Petitioner was sentenced to three years imprisonment for allegedly arranging without authority to obtain the said copy.

At the trial, petitioner denied that he had any reason or motive for appropriating the copy of the transcript. All efforts to prove by independent evidence that under the law military and the civil law petitioner knew that he was entitled to a copy of the transcript without charge were frustrated by the trial court's rulings, and the instructions of the court virtually directed the jury to find that petitioner had a reason and motive for committing the alleged offense. The sufficiency of the evidence was sustained despite the fact that it rested upon the single testimony of an incompetent witness.

After trial, petitioner and his counsel for the first time discovered that the prosecution had suppressed the evidence of a witness who had actually been with the prosecution witness at the time the latter took the office copy of the transcript, and who had herself secreted the transcript for the benefit of the prosecution witness. This newly discovered and detailed testimony completely exculpated petitioner; yet the witness had actually been secreted by the prosecution during the trial and her testimony withheld from petitioner and his counsel. A motion for a new trial was summarily denied.

We detail these matters in the statement which follows.

The Retention of Petitioner as Counsel.

The petitioner was retained in July, 1952, to represent a Sergeant Bennette in pre-trial investigation proceedings at the El Toro Marine Air Station located in Orange County, California [C. Tr. 19]. See 50 U. S. C. 603(b). The charge generally was that the marine had violated a provision of the Marine Corps Manual (Vol. 1, par. 15250) by engaging in the business of transporting for hire certain personnel and wrongfully interfering with the regular employment of local civilians in their trades.

In the representation of his client at the military base, petitioner made on behalf of his client serious charges of derelictions in office and disregard of the provisions of the Uniform Code of Military Justice by the Commanding General and his immediate subordinates at the Marine Air Station [C. Tr. 19]. A communication in writing setting forth these charges was sent by petitioner on behalf of his client to the Commandant of the United States Marine Corps at Washington, D. C. [C. Tr. 19]. The record does not indicate that these charges were ever denied, or the final disposition thereon. It appears that a request from Washington was thereafter made upon the local Commanding General at the Marine Base for a full report. Instead of making such a report, the said Commanding General convened a military Court of Inquiry (See, 50 U. S. C. 731) and on November 25, 1952, while petitioner was appearing on behalf of his client in

court-martial proceedings,[2] petitioner was served with a subpoena requiring his appearance as a witness at the Court of Inquiry on December 4, 1952 [C. Tr. 21].

Proceedings of the Court of Inquiry.

The proceedings of the Court of Inquiry appear to have been conducted in sharp variance with the provisions of the Uniform Code of Military Justice and the regulations thereunder. The object of the proceedings appears largely to have been a self-generated attempt to exculpate the military officials involved and to obtain a retraction from civilian counsel of the charges he had lodged against the officials on behalf of his client [C. Tr. 21].

The subject matter of the inquiry was, as aforesaid, the charges made by petitioner on behalf of his client against the commanding officer at the Marine Base and his subordinate officers. It was this commanding officer who convened the Court of Inquiry, appointing three subordinate officers as members of the "Court," all laymen [C. Tr. 21]. The same convening authority appointed counsel for the "court." 50 U. S. C. 731(b). A

---

[2]Following the pre-trial investigation, court-martial proceedings were instituted against Sergeant Bennette, who was represented therein by petitioner. Bennette was subsequently found guilty [C. Tr. 20]. Petitioner, in association with other counsel, represented Bennette on appeal [R. 290]. On March 18, 1953, a Navy Board of Review unanimously reversed the findings of guilt and invalidated the sentence, which had been severe. The Board found that the Marine Corps regulation was a limitation solely on commanding officers and imposed no prohibition or limitation on the conduct of individual enlisted men. *United States v. Bennette*, 9 Court-Martial Reports (CMR) 600. The Judge Advocate General of the Navy refused to certify the case to the Court of Military Appeals [C. Tr. 23]. See, *Digest of Opinions, The Judge Advocates General of the Armed Forces*, Vol. 3, p. 96 (July-September, 1953).

Lieutenant-Colonel who had been one of those accused by the client and the petitioner of wrongdoing was "designated as a party" to the action. He was thus entitled to be given due notice, to be present, "to be represented by counsel" [C. Tr. 24], to cross-examine witnesses, and to introduce evidence. 50 U. S. C. 731(c).

Sergeant Bennette also requested that he be designated as a party [C. Tr. 21], but this request was denied.[3] Thus, Sergeant Bennette, unlike the Lieutenant-Colonel, was deprived of the right to be represented by petitioner as his counsel, to be present at the proceedings, to cross-examine witnesses or to introduce evidence. Instead, his civilian counsel was subpoenaed as a witness in these military court proceedings on the military base [C. Tr. 21-22].

The proceedings before the Court of Inquiry were *in camera*, and petitioner himself was denied the right to counsel [C. Tr. 22].[4] As petitioner swore in support of a preliminary motion prior to trial, he "was treated in all respects like a prisoner" before the Court of Inquiry [C. Tr. 22]. The Court was called into session on December 3, 1952 [R. 219]. Petitioner appeared the next day [R.

---

[3]The Uniform Code of Military Justice provides: "Any person subject to this chapter or employed by the Department of Defense who has a direct interest in the subject of inquiry shall have the right to be designated as a party upon request to the court." 50 U. S. C. 731(c).

[4]Winthrop states that the present day court of inquiry cannot be compared to a grand jury. ". . . but, as the party whose conduct is under investigation may be present with counsel, and be heard in his defense, at its sessions, and its proceedings may be and generally are public, the analogy indicated is by no means complete." *Military Law and Precedents* (1920), p. 522. See also, p. 528, where the author concludes: ". . . with us, courts of inquiry, unless otherwise instructed in Orders, are in general held as open courts."

220]. He was interrogated for three days, December 4, 5 and 6, the constant object being to make him substantiate the charges he had made against the military officials, or to retract them [C. Tr. 21-22]. He declined to answer some of the inquiries, asserting that the court had been illegally and invalidly convened [C. Tr. 21], that the officers of the court were not impartial, that the inquiries sought information furnished in confidence by a client to his attorney, that in the setting of the inquiry the petitioner by his answers might subject himself to the dangers of a prosecution, however baseless, and upon other related grounds.[5]

Believing himself excused from further attendance at the inquiry, petitioner made no further appearance after December 6 [C. Tr. 22]. The court did not sit on December 7 or 8 [R. 219-20]. On December 9, 1952, the military body peremptorily issued a purported Warrant of Attachment, and without prior notice, four armed Military Police proceeded to the law offices of petitioner in Long Beach, California, and forcibly brought him before

---

[5]The Manual for Courts-Martial, 1951 (MCM), p. 285, provides: "Military or civilian counsel detailed, assigned, or otherwise engaged to defend or represent an accused before a court-martial or upon review of its proceedings, or during the course of an investigation of a charge, are attorneys, and the accused is a client, with respect to the client and attorney privilege." See also, 50 U. S. C. 602, 731(d). Subsequently, and because of his refusal to answer these inquiries, petitioner was charged with a violation of 50 U. S. C. 622 in an information filed in the District Court. On a motion to dismiss the information prior to trial, the District Court held that petitoner had waived his privileges by the sending of the written communication, the court mistakenly assuming that the letter was some appeal from Bennette's subsequent court-martial and an attack upon members of the court-martial. United States v. Shibley, 112 Fed. Supp. 734 (D. C., 1953). The legal and factual issues were mooted, however, when the jury acquitted the petitioner on some counts of the information and made

the Court of Inquiry at the military establishment [C. Tr. 22].

Petitioner was again before the Court of Inquiry on December 9 and 10 [R. 220]. The court sat thereafter on December 11 and 12 [R. 220], when its proceedings were concluded. The court was in session eight days in all [R. 220]. The only days when petitioner was not present at the sessions of the court were the first day, December 3, 1952, and the last two days, December 11 and 12, 1952 [R. 219-220].

By December 17, 1952, the proceedings had been entirely transcribed, requiring only the signature of the Commanding General of the Marine Base, who signed on December 19, 1952 [R. 222]. An original and three copies of the transcript (227 pages) were sent to the Commandant of the Marine Corps at Washington, D. C. [R. 202]. A fifth, sixth or seventh copy of the transcript was placed on December 19, 1952, in a drawer of a filing cabinet in one of the offices of the law building situated on the Marine Base [R. 202]. This copy was subse-

---

no finding with respect to the others. After the jury verdict, the trial court sentenced petitioner to 30 days imprisonment in summary contempt proceedings. Rule 42(a), Federal Rules of Criminal Procedure.

On appeal to the Court of Appeals, this judgment of contempt was confirmed but the case was remanded to the same trial judge to reconsider the contempt sentence in view of the passage of time and the affirmance of the judgment of conviction here involved. The opinion is unreported (No. 14464); both the criminal appeal herein and the contempt appeal were argued at the same time in the Court of Appeals. The cases are related and the record of the contempt case contains additional material on the the arbitrary treatment of petitioner as civilian counsel by the military officials who actively assisted in the contempt prosecution and the prosecution herein. A petition for a writ of certiorari will be filed in the contempt case, and will thus enable this Court to consider these two related cases together.

quently missed. Petitioner has been convicted under 18 U. S. C. 641 and the general conspiracy statute (18 U. S. C. 371) and sentenced to 3 years imprisonment for allegedly arranging to have another person appropriate the transcript for petitioner's use, the jury specifically finding that the transcript was worth less than $100 [C. Tr. 91].

The Indictment and Trial.

The indictment returned on June 25, 1953, was in four counts [C. Tr. 2]. The first count charged petitioner and one Charles Raymond Thompson, with entering, on December 19, 1952, lands reserved for the exclusive use of the United States with intent to commit larceny therein in violation of 18 U. S. C. 7 and 13 and California Penal Code 459 and 460. The petitioner was charged in the said count with aiding and abetting Thompson in the commission of the said offense. The jury returned no verdict against petitioner on this count of the indictment [C. Tr. 2, 91].

The second count charged petitioner and Thompson with stealing "a copy of the transcript of the proceedings of a United States Marine Corps Court of Inquiry convened to investigate charges made against certain Marine Corps personnel by defendant George E. Shibley" [C. Tr. 3], said copy alleged to have a value of over $100, all in violation of 18 U. S. C. 641. This count of the indictment was dismissed as to petitioner prior to trial on motion of the prosecutor [R. 5-8].

The third count of the indictment [C. Tr. 4] alleged that petitioner and Thompson received, concealed and retained the aforesaid copy with intent to convert the

said copy to their own use and gain, knowing the copy to have been stolen, in violation of 18 U. S. C. 641. This count was dismissed as to Thompson prior to trial [R. 4]. The jury returned a verdict of guilt and fixed the value of the copy at less than $100 [C. Tr. 91]. The sentence was one year imprisonment [C. Tr. 179], the maximum term permissible under the Statute, 18 U. S. C. 641.

The fourth count [C. Tr. 5-6] alleged that petitioner and Thompson conspired (18 U. S. C. 371) to commit the substantive offenses as set forth in the first three counts, the subject matter of the conspiracy being the same copy of the transcript as aforesaid. The jury returned a verdict against petitioner on this count [C. Tr. 91].[6] The sentence was three years imprisonment, sentences under the third and fourth counts to run concurrently [C. Tr. 179].

The Court of Appeals below, in affirming the judgment of conviction, stated: "The main framework of the case was laid by the testimony of Thompson, the co-defendant" (App. A, p. 4). The court also stated: "It is true the testimony of Thompson, as a co-conspirator and the chief actor, was necessary to give continuity to

---

[6]The jury deliberated for twenty-four hours, covering a two day period [R. 495-578]. At the end of that time, they returned to the courtroom with a request for further explanation of the instructions on conspiracy [R. 561]. The court reread a portion of the instructions previously given, and immediately followed this with the "Allen" instruction (164 U. S. 492), unsolicited by the parties [R. 561-73]. The jury undoubtedly retired with the impression, under the coercive circumstances [R. 568-72], that the all-important thing was a final disposition of the case. *Cf., Burton v. United States,* 196 U. S. 283, 304-308.

the circumstances and was the sole support of a considerable portion of the case for the prosecution" (App. A, p. 6). The fact is, as the record makes clear, the testimony of Thompson was the sole basis for the judgment of conviction.[7]

The questions presented in this proceeding assume additional significance because the case as finally made by the prosecution had all the earmarks of a scheme by a pliable and unsavory witness to extricate himself from

---

[7]Thompson was confined in a private sanitarium for the mentally afflicted and sick in New Orleans in 1949 [R. 168], where he received electric shock therapy [R. 169]. In the same year, he was also confined in the Gulfport Hospital in Mississippi, a veterans' hospital, for a mental affliction [R. 169]. On April 28, 1950, he was confined in the State Institution in Central Louisiana at Pineville, Louisiana, by an order issued out of the 15th Judicial Court of Louisiana for the Parish of Vermillion in the town of Abbeville [R. 167]. As of the time he testified, the order of commitment had not been set aside [R. 168]. It was not denied that in 1952 he had debauched a young girl of sixteen and taken her from California to Nevada for the purpose of having sexual relations with her [C. Tr. 146]. He had been employed in 1952 by a Captain J. B. Worley, who ran a private detective agency in Long Beach, California [R. 350]. Captain Worley testified that Thompson's reputation for truth, honesty and integrity was very bad [R. 353] and that he would not believe him under oath [R. 353]. In reply to an inquiry by the court, the witness testified that Thompson "stole a lot of money from me and a lot of other people's in Long Beach" [R. 354]. The Court below held that this reputation testimony was properly stricken by the trial court because "the witness clearly stated he was testifying to a time after finding of the indictment" (App. A, p. 10). The reputation testimony covered the period from July 11, 1952, to May 6, 1953 [R. 352]. The indictment was not returned until June 25, 1953 [C. Tr. 2]. Petitioner's office had used the services of Captain Worley and his staff on occasions for process serving and investigations in civil cases. Thompson had only met petitioner within two months before December 19, 1952 [R. 142].

his own wrongdoing by fixing the blame upon an attorney who had incurred the animosity of the military officials.[8]

The case came down to this: A corporal in the Marine Corps had been petitioner's escort from the "gate" at the Marine Base to the legal office in the law building inside the Base where the Bennette court-martial proceedings were held [R. 78]. The corporal testified that he felt that petitioner had not been accorded "the courtesy that civilian counsel is usually accorded upon the base" [R. 82]. When he learned how petitioner had been forcibly taken from his law office to the Court of Inquiry, he spoke to petitioner and told petitioner if there were anything he could do to help he would [R. 59, 83-4]. The corporal testified that the petitioner didn't ask him for any help [R. 85]. The corporal had nothing dishonorable

---

[8]Two months after the copy of the transcript was missed, Thompson told agents of the Office of Naval Intelligence that petitioner had nothing to do with its taking [R. 184]. He was arrested and taken into custody on May 26, 1953 [R. 185]. The indictment was filed on June 25, 1953. He was arraigned on July 6, 1953 [Pr. R. 9], represented by separate appointed counsel [Pr. R. 21]. On October 27, 1953, his counsel stated that Thompson was ready for trial [Pr. R. 79]. On November 12, 1953, his counsel was still ready for trial [Pr. R. 87], and agreed to try the case on November 24 [Pr. R. 89]. On November 16, 1953, for the first time, counsel indicated that Thompson's plea would be changed only "if the case is (not) going to be continued to an indefinite period of time." [Pr. R. 98.] Thompson was released immediately on his own recognizance [Pr. R. 104]. He changed his plea for the first time on the opening day of trial, December 8, 1953, pleading guilty to the first and fourth counts of the indictment [R. 3-5]. Despite his admissions at the trial, this "chief actor" (App. A., p. 6) received a suspended sentence [C. Tr. 119]. A corporal in the Marine Corps who had told Thompson where the copy of the transcript was located and when it might be obtained unknown to the others at the military establishment [R. 57-108] was never disciplined by the military nor prosecuted by the civil authorities [R. 105-6]. The corporal completed his active duty in the Marines in 1953 and still retained the rank of corporal in the Marine Corps Reserve when he testified [R. 76].

in mind, and petitioner never requested him to do anything dishonorable [R. 85]. Petitioner thanked the corporal, took his name and address and said that a man named "Rusty" might contact him [R. 59, 85-6]. This was on December 9, 1952, and the corporal never saw or spoke to petitioner thereafter [R. 86-7].

Thompson, also known as "Rusty," testified that about December 1, petitioner called Thompson to his office. The discussion was about some investigation work dealing with two court-martial proceedings, one involving Bennette and another, a Lieutenant Billie Adams [R. 115, 145]. Petitioner asked Thompson to contact Lieutenant Adams and the corporal [R. 115]. There was no mention of any transcript of the Court of Inquiry.

Thompson visited the corporal thereafter and had a number of conversations with him, all out of the presence of petitioner [R. 86-7]. Thompson initiated the inquiry about the copy of the transcript of the Court of Inquiry, informing the corporal that he was interested in obtaining information about all the proceedings at the Marine Base for the Judge Advocate in Washington, D. C., a senator and "Drew Pearson" [R. 91]. He informed the corporal that "various interests back East" were interested in the outcome of cases tried at the Marine Corps Air Station [R. 65].[9]

---

[9]Thompson had been in the Marine Corps himself, and later enlisted in the Marine Reserves. He never gave the Reserves a history of his mental afflictions [R. 171]. Thompson, in 1952, was rooming with a Pat Fields, a confirmed drunkard [R. 134-40, 372-74], who, prior to December 19, 1952, had been an investigator for Drew Pearson, in Washington, D. C. and in California [R. 240]. Thompson and Fields had been living together in various rooming houses [R. 134-40], where Thompson kept his Marine uniforms [R. 135].

From the corporal, Thompson learned when a copy of the transcript would be available and where it would be located [R. 72-4]. A few days before December 19, 1952, Thompson visited a photographer in Long Beach to inquire if the latter could photograph a transcript, and apparently received an affirmative answer [R. 395]. On December 19, 1952, Thompson went to the home of his friend, Pat Fields, put on his Marine uniform, and in the early morning of December 20 went on the Marine Base and obtained a copy of the transcript [R. 127-8].

December 20 was a Saturday. Thompson took the copy of the transcript to the photographer who, with the aid of an employee, succeeded in having a photograph and a negative of the copy of the transcript ready the next day, Sunday [R. 396-99]. On Sunday, Thompson paid the photographer $150 as requested, and took with him the three documents [R. 399].

Thereafter, Thompson and his roommate, Pat Fields, wrapped the three transcripts, put on the name of a fictitious sender, and mailed the documents by registered mail, return receipt requested [R. 230-4]. The copy of the transcript alleged in the indictment was sent to Drew Pearson. The photographic copy was mailed to the office of petitioner's attorney, and the negatives mailed to petitioner at his law office [R. 231-33]. The registry receipts were kept by Thompson and Fields [R. 234]. They were therefore in the position, through the registry receipts, of proving to any or all of the recipients, if the

material was used, that they were responsible for the availability of the documents and entitled to their reward. If the material was not used, and no reward was forthcoming, they were assumedly secure from detection.

As noted aforesaid, it was more than six months after his initial conversations with Federal agents and after his release from jail on his own recognizance that Thompson for the first time implicated petitioner (*supra*, note 8). At the trial, Thompson did not purport to testify to any request by petitioner to Thompson to obtain the transcript for petitioner, nor did he maintain that petitioner knew any of the details of his conversations with the corporal. His sole statement in response to an inquiry was simply: "I talked to Mr. Shibley about this every day." [R. 120.] Thompson stated that on December 19 he spoke to petitioner and told him that the records were being transmitted and would be unavailable thereafter [R. 125-26]. Petitioner allegedly asked Thompson if the records could be gotten, and Thompson stated: "Yes, it appears as though they can." [R. 126.] Petitioner purportedly inquired of Thompson whether the latter had in mind what he was going to do and Thompson said he did [R. 126]. Thompson attributed to petitioner an additional statement, "something to the effect" that Thompson shouldn't forget to wear gloves "or something like that" [R. 126]. This was the substance of the entire testimony involving petitioner on the substantive and conspiracy counts prior to the disappearance on December 19, 1952, of the copy

of the transcript of the Court of Inquiry from the law office on the military base.[10]

Petitioner took the stand and denied the evidence in the prosecution's case which purported to implicate him in the offenses charged in the indictment [R. 289-347]. His testimony was supported by his secretary [R. 260-273, 359-68], by Daniel G. Marshall, Esq., his attorney [R. 273-88], and by Sergeant Bennette, his client at the Marine Base [R. 349-50]. The testimony of Thompson's employer as to Thompson's bad reputation, as aforesaid, was stricken by the trial court [R. 350-57].

The petitioner's position throughout the trial was that the tenuous case against him had been patently contrived, that he had no motive or reason for receiving a stolen copy of the transcript of the Court of Inquiry or conspiring to receive such a purloined copy. It was his contention that under the Uniform Code of Military Justice, the Navy regulations governing the Marine Corps, and the law military, as well as under the civil law, he was entitled to receive a copy of the entire transcript free

---

[10]Thompson stated at the trial that the idea of photographing the copy of the transcript and mailing the documents was petitioner's, suddenly conceived when Thompson showed petitioner the copy of the transcript on Saturday, December 20, 1952 [R. 129]. Thompson stated that he told petitioner that the photographer had asked $200 for the job, that petitioner agreed to pay it, and that Thompson received $200 in cash from petitioner's secretary on Monday and paid the photographer on that day, receiving the documents at that time [R. 191]. This was proven to be patently false by the prosecution witnesses themselves, the photographer and his assistant, who were called belatedly by the prosecution virtually upon the trial court's insistence [R. 174], and who testified that Thompson had inquired about photographing a transcript some days before December 20, that the sum charged was $150 and that Thompson had paid that sum on Sunday and taken away the documents on that day [R. 381-99].

of charge and to inspect and copy it [R. 310-17], that this was his understanding before the copy of the transcript was missed [R. 310-19].

Petitioner's attempt to prove his innocence, his absence of motive, knowledge and intent was sharply curtailed by the courts below by what appears to be a misconstruction of 18 U. S. C. 641 as interpreted by this Court in *Morissette v. United States,* 342 U. S. 246, and in conflict with relevant decisions of other Courts of Appeal. In the light of the tenuous character of the case against petitioner and the lengthy deliberations of the jury before reaching their verdict, the rulings of the courts below on this aspect of the case take on crucial importance.

The testimony showed that petitioner had retained counsel on the evening of December 9, 1952 [R. 275], the day when petitioner had been forcibly removed from his law offices to the Marine Base to again appear before the Court of Inquiry [R. 275]. He consulted with his attorney thereafter [R. 275]. Petitioner sought to show through his own testimony and that of his attorney, that he had been advised by his counsel as to his absolute right to a copy of the transcript of the Court of Inquiry under the military law, and also under the civil law in the event contempt proceedings were initiated for failure to answer the inquiries of the Court of Inquiry [R. 276-78, 282-84, 312, 582; C. Tr. 113]. All of his testimony was excluded, the trial court stating: "The substance of my ruling was to the effect that any statement that this man may have made to his attorney or any advice his attorney gave him would be self-serving" [R. 312, 582]. The Court of Appeals below sustained this position, holding that the "defendant was allowed to testify as to his belief upon these matters. Therefore, so far as motive

was concerned, the proof was before the jury. His belief, and not the facts or the advice, was the important matter." (App. A, p. 9.)

Petitioner requested the trial court to instruct the jury that in determining "whether or not the said defendant had a motive for the commission of the offenses," the petitioner had a legal right prior to December 19, 1952, to inspect the record or a copy of the entire transcript of the Court of Inquiry [C. Tr. 71]. Petitioner requested an instruction that in the determination of his motive the jury should consider that on or before December 19, the record of the Court of Inquiry was a public record which petitioner was entitled to inspect [C. Tr. 72]. There were other requested instructions in the same vein [C. Tr. 73-76]. All of these instructions were refused. No others of similar import were given or attempted by the trial court. Instead of informing the jury on the state of the military and civil law in the light of petitioner's claim that under the law petitioner had no reason or motive for committing the offense, the trial court instructed the jury, over petitioner's objection, as follows:

> "The transcript of the Court of Inquiry proceedings affecting the defendant Shibley, a copy of which defendant Shibley would eventually have been entitled to receive." [R. 476.]

This cryptic instruction was construed by the trial court as follows: "So far as this case is concerned the only thing he was entitled to at all would be, eventually, to have received a copy of the transcript affecting him and I have so instructed the jury and I will not go any further on that." [R. 505.] The transcript of the Court of Inquiry covered eight days; petitioner was present five days. The only days when petitioner was not present

was the first day and the concluding two days [R. 219-20]. Thus, the jury was instructed that petitioner could not have reasonably expected "at all" to receive the entire transcript, that he would eventually have received only the portion of the transcript affecting him, and, in effect, that petitioner had a motive for purloining the document. This was a paraphrase of the prosecution's theory of the case.[11] The petitioner thus was not only denied the opportunity to present evidence in support of his contention that he had no reason to commit the offense, but, following denial of his requested instructions, petitioner was placed in the position by the trial court before the jury of actually having a motive as a matter of law to commit the crime.

The Court of Appeals below held that the instruction given "was more than fair" (App. A, p. 10); that petitioner's requested instructions had properly been refused; that absence of motive was "only the foundation of a jury argument" (App. A, p. 10); that motive was not an essential element of the prosecution's proof, and that "even in the absence of any conceivable motive defendant could still be convicted." (App. A, p. 10.)

Suppression of Evidence by Prosecution and Motion for New Trial on Newly Discovered Evidence.

The verdict was returned on December 12, 1953 [R. 573]. About thirty days later, petitioner moved for a new trial based upon newly discovered evidence [C. Tr. 121-77]. The motion was summarily denied by the trial court without opinion [R. 596].

---

[11] In his summation, the prosecutor stated to the jury: "The law is that Shibley was entitled to that portion of the transcript consisting of his testimony which comprised less than one-half of the testimony taken at that Court of Inquiry." [R. 462.]

The evidence in support of the motion was as follows:[12] Mr. and Mrs. Shibley lived with their children at a home in Long Beach [C. Tr. 136]. In or about June, 1952, a young girl, Yvonne Fuller, about sixteen years of age, was placed under the supervision of the Shibleys by the California Youth Authority as a "mother's helper" [C. Tr. 136]. Yvonne met Thompson early in December, 1952, and began to go out with him, unknown to petitioner and his wife [C. Tr. 146]. On December 19, 1952, Thompson phoned Yvonne in the middle of the afternoon and asked her if she wanted to go out that night. Thompson warned Yvonne not to tell the Shibleys and to meet him at a drugstore corner at about 7:00 p. m. [C. Tr. 147]. She met Thompson at the appointed hour and place [C. Tr. 147]. Thompson was wearing a Marine uniform, a uniform she had never seen him wear before [C. Tr. 147].

Thompson took Yvonne to the corporal's home. On the way, he asked her if she could hold some important papers for him and hide them secretly from everybody including the Shibleys [C. Tr. 149]. Yvonne said she couldn't do that at the Shibley's home, but she could keep them at her family's home in Lawndale [C. Tr. 149]. She asked if there was something illegal about it and Thompson stated: "Well, only in a way." [C. Tr. 149.] Thompson told Yvonne he would get a lot of money for the papers, that they probably would be able to get married "because there would be a lot of money coming in from some big newspapers" [C. Tr. 149]; that he wasn't scared, he was protected and could "always pin it on someone else." [C. Tr. 149.]

---

[12]No opposing affidavit was submitted by Thompson.

Yvonne met the corporal and his wife at their home, but she was introduced merely as a "lady friend" and heard nothing of the private conversation between the corporal and Thompson [C. Tr. 149]. Thompson drove her later that night to a motel in Santa Ana [C. Tr. 149].[13] He told her he had to be at El Toro (where the Marine Base was located) at about 2 or 2:30 a.m. He returned about 3 o'clock and then they went back to bed together and slept until morning [C. Tr. 149-50].

On the way back to Long Beach the next morning Thompson told Yvonne that he would spend most of the day at "Joe's, a photographer" [C. Tr. 150]. He let Yvonne off at the drugstore, and told Yvonne that he would call her at the Shibleys [C. Tr. 150]. About noon, Thompson came to the Shibley home, saw petitioner in his bedroom for about 5 or 10 minutes and then left [C. Tr. 151]. Later in the afternoon, Thompson called Yvonne on the phone. He said he was going to stay at the photographers. He told Yvonne that petitioner had treated "him like a criminal and that Mr. Shibley was very angry with him, with Rusty, and that Shibley had booted him out of the house." [C. Tr. 151.][14]

Thompson told Yvonne he didn't want her to stay at the Shibleys. Yvonne, that very day (Saturday), told the Shibleys she was leaving to stay with her father

---

[13]Thompson, from their initial meetings, had promised the young girl he would marry her. He had sexual intercourse with her many times, once driving her to Las Vegas, Nevada, where they stopped at a motel for the consummation of such purpose. [C. Tr. 146.]

[14]Petitioner on the stand during the trial denied any knowledge that Thompson intended to steal the copy of the transcript or any prior conversations with respect thereto. He stated that Thompson had come into his bedroom on Saturday at about noon and showed

and step-mother in Lawndale [C. Tr. 151]. She was at Lawndale on Sunday where Thompson called for her and took her to the Photo Shop [C. Tr. 151]. Thompson, still resentful for being thrown out of petitioner's home, urged Yvonne never to say anything about how he got the papers at El Toro, neither to petitioner nor his wife nor anyone else [C. Tr. 152].

Thompson went into the photo shop and came back with a copy of the transcript, the photograph and negative [C. Tr. 153]. He put all the documents in a strong box which had a combination lock [C. Tr. 153]. He gave the box to Yvonne. At her home in Lawndale, Yvonne "sneaked the box in the house and hid it in my bedroom" [C. Tr. 153]. Thompson told Yvonne that if anyone found the box at home "I could say that it was something Mr. Shibley gave me to keep for him," and not to mention Rusty's name [C. Tr. 153]. She kept the box for about two or three days and then returned it to Thompson [C. Tr. 153-4]. Thompson, as was shown at the trial, together with Pat Fields, the former investigator of Drew Pearson, later mailed the documents as aforesaid, registered mail, return receipt requested.

All of the foregoing was unknown to petitioner and his counsel prior to and during the trial [C. Tr. 128-30, 132-34, 141-43]. Also unknown to petitioner and his counsel were the following circumstances which occurred

---

him what appeared to be a transcript [R. 306]. Petitioner asked him where he got it, and Thompson told him that it was not classified or restricted material, that "it is perfectly okay only I have to get it back by 5:00 o'clock tomorrow night, Sunday night." [R. 307.] Petitioner immediately told Thompson to take it away, and Thompson did [R. 307]. Petitioner did not know at the time he testified that Yvonne Fuller could confirm his testimony, that she knew that petitioner had "booted" Thompson out.

after the discovery by the military officials that one of the office copies of the transcript of the Court of Inquiry was missing, and when the movement to ensnare petitioner through Thompson began.

From the corporal, the agents of the Naval Department apparently learned about Thompson and his "lady friend," Yvonne Fuller. On May 18, 1953, Yvonne was in custody in Los Angeles County Juvenile Hall. There she was interviewed privately by two agents [C. Tr. 172-3], and signed a statement less than one page in length, typed up by the officers [C. Tr. 176]. She stated that she had registered in a motel with Thompson on December 19, 1952, that Thompson had left her at the motel, travelled to the Marine Base, stole the document, and returned to the motel [C. Tr. 174-6]. The statement did not include any facts as to how she came to go with Thompson to the motel, what he told her, or any other relevant information normally obtained by investigative officers. The short prepared statement [C. Tr. 176] did not essentially contradict her detailed testimony in support of the motion for a new trial, although it varied in minor particulars. It appears clear from the statement that she was known to the agents on May 13, 1953, as an essential witness. Eight days later, Thompson was arrested [R. 185].

When months later, Thompson finally implicated petitioner and the case was nearing trial, the prosecutor obtained "a writ of habeas corpus ad testicandum" from the United States District Judge and Yvonne Fuller was placed in the custody of the United States Marshall [C. Tr. 166]. In this manner, Yvonne was brought to the prosecutor's office where she stated that she was

willing to testify against Thompson, but not against petitioner [C. Tr. 166]. The prosecutor told her that this was a matter for the trial court to decide, that unless she had a valid constitutional objection, the Court could hold her in contempt [C. Tr. 166]. Yvonne insisted, stated the prosecutor in a sworn affidavit in opposition to the motion for new trial, that she would not testify against petitioner [C. Tr. 166]. Nevertheless, Yvonne Fuller was kept in the custody of the United States Marshal and she "was present in the United States Marshal's office in the U. S. Post Office and Courthouse during the course of the Shibley trial" [C. Tr. 166].

As heretofore noted, all of the aforesaid was unknown to petitioner, his counsel or the trial court itself. Petitioner swore, his counsel, reputable members of the Bar, swore, that in preparation for trial no one knew that this sixteen year old girl had knowledge of any facts material to petitioner's defense [C. Tr. 128-30, 132-4, 141-3].

The following occurred at the trial: Thompson had insisted on the stand, as aforesaid, that he had a number of conversations with the corporal, confirmed by the latter, and that on some of these occasions Thompson had been accompanied by his "lady friends." The corporal recalled "a young girl, a blonde by the name of Yvonne" [R. 69] and a lady known as "Marvel Bloomquist" [R. 121]. Both the corporal and Thompson insisted that neither of these ladies knew anything about their conversations; they were just social companions whose presence could corroborate the meetings of the corporal and Thomp-

son [R. 57-108, 114-198]. While Thompson was being cross-examined by petitioner's counsel, he denied that he ever took narcotics but volunteered that the young lady with him on December 19 might have [R. 172]. When he was pressed to answer, the prosecutor objected:

> "Mr. Bowler: I am going to object to this line of interrogation. The girl, whoever she was, is not on trial and that has no bearing on the issues involved here. I object to it as immaterial and not proper impeachment." [R. 172.]

However, on redirect examination, the prosecutor asked Thompson to state where the young girl whom Thompson referred to as a possible narcotic addict, lived on December 19 [R. 188]. Thompson didn't know where she lived on that day, but stated that prior thereto she lived at petitioner's home [R. 188].[15] This attempt to besmirch petitioner and his wife was met by an inquiry on recross examination by petitioner's counsel as to whether Thompson knew that Yvonne Fuller had been paroled to petitioner's wife by the Youth Authority of California [R. 195].

> "Mr. Bowler: That is objected to as calling for a conclusion of this witness.
>
> The Court: I don't think that is proper, counsel. You must remember there is only one person on trial in this case now.

---

[15]Thompson equivocated because, as later appeared after the trial, he knew that at about that time Yvonne left petitioner's home to move to Lawndale [C. T. 151].

Mr. Ball: That is correct. Let me say this: That little girl was working as a maid in that home.

The Court: Let us not discuss her.

Mr. Ball: But he tried to bring out she was living there in Shibley's house. We want to show the situation.

Mr. Bowler: You can't show it by this witness. You might be able to show it by other witnesses.

The Court: Is she here?

Mr. Bowler: She is available, your Honor, and we will have her here.

Mr. Ball: I won't pursue the question then.

The Court: I think you are getting on dangerous ground, counsel.

Mr. Ball: But I didn't want to leave any inferences at all. I won't pursue it, your Honor, if your Honor thinks it is immaterial. I won't go into it." [R. 195-6.]

This side issue thus was apparently eliminated from the case so far as petitioner's counsel was concerned. The other "lady friend," Marvel Bloomquist, was called and gave innocuous testimony [R. 241-5, 376-77]. The prosecution rested without calling Yvonne Fuller, the prosecution alone knowing that Yvonne Fuller, an essential witness with significant testimony who had refused to testify against petitioner, was in the custody of the United States Marshal in the courthouse where the case was being tried.

The Court of Appeals held that it was "open to grave doubt" that reasonable diligence had been employed by

counsel for petitioner; that Yvonne was "available to defendant so that he could have availed himself of the opportunity to interview her"; that the prosecutor had not been guilty of suppression of evidence (App. A, p. 8). The court below held that the trial court's denial of the motion was conclusive because there was no manifest abuse of discretion under Rule 33 of the Federal Rules of Criminal Procedure, and that under the circumstances Yvonne Fuller's testimony could not be "of such a nature that it probably would produce an acquittal." (App. A, p. 8.)

In affirming the judgment of conviction, the Court of Appeals held also that the evidence was sufficient to justify the conviction under 18 U. S. C. 641 and 18 U. S. C. 371 and that the sentence of three years on the conspiracy count was not illegal, despite the jury's finding in essence that the object of the conspiracy was a misdemeanor. Other questions of law raised by petitioner were also dismissed by the court below as insufficient to justify a reversal of the conviction (App. A, pp. 10-14).

ARGUMENT AND REASONS RELIED UPON FOR GRANTING THE WRIT.

A.

The Court of Appeals below has decided federal questions in conflict with applicable decisions of this Court and has rendered a decision in conflict with the decisions of other Courts of Appeal on the same matter.

I.

The Courts Below Erroneously Construed and Applied 18 U. S. C. 641, the General Conspiracy Statute, the Uniform Code of Military Justice and the Rules and Regulations Thereunder by Refusing to Permit Petitioner to Prove That He Had No Reason or Motive for Appropriating the Office Copy of the Transcript of the Court of Inquiry and by Prejudging the Issue in Instructions to the Jury and Refusals to Instruct, With the Resultant Deprivation of Petitioner's Liberty Without Due Process of Law in Violation of the Fifth Amendment.

This Court recently construed 18 U. S. C. 641 in *Morissette v. United States*, 342 U. S. 246. It was there held that criminal intent is an essential element of the offense; that the existence of the intent or absence of intent is a question of fact which must be submitted to the jury for determination in the light of all relevant evidence.

The courts below have construed and applied 18 U. S. C. 641 in this case contrary to the decisions of this Court in *Morissette*. The charge against this petitioner was that he knowingly received an office copy of the transcript of the Court of Inquiry with intent to convert the copy to his own use and gain, and conspired with Thompson, the "chief actor" (App. A, p. 6) and the "sole support

of a considerable portion of the case for the prosecution" (App. A, p. 6), to do so. Petitioner's principal defense was that he had no reason to commit the substantive offense or to conspire with Thompson, that he had no motive for the commission of these offenses. In short, petitioner contended that he was innocent of any wrongdoing and sought by evidence and requested instructions to bring all the circumstances before the jury. Instead, in law and in fact he was blocked by the trial court from proving his innocence and his guilt presumed as a matter of law.

A. It is fundamental that an accused may always offer evidence to show that he did not have any motive or reason to commit the crime. Wharton's *Criminal Evidence* (12th Ed.), Vol. I, Section 166, p. 324; Wigmore, *Evidence* (3rd Ed.) Vol. I, Sections 118-119, Vol. II, Section 254. Especially is this true where an accused denies the commission of the crime, where the testimony against him on both the substantive and conspiracy counts hinges entirely on the tenuous testimony of a single unsavory witness, the admitted "chief actor" in the crime, and where corrupt motive or fraudulent intent is made an important element of the prosecution's case. *Cf., Morissette v. United States*, 342 U. S. 246; *Screws v. United States*, 325 U. S. 91, 101; *Potter v. United States*, 155 U. S. 438; *Spurr v. United States*, 174 U. S. 728, 735. See also *Krulewitch v. United States*, 336 U. S. 440.

The courts below held that the aforesaid rules of law were satisfied by limiting petitioner's evidence on this issue to his own disclaimer of any reason or motive for commission of the alleged offense. The independent testimony which petitioner offered to prove his state of mind was rejected as "self-serving" by the trial court. The

Court of Appeals held that petitioner's belief, and not the independent evidence was "the important matter." (App. A, p. 9.) These rulings are squarely in conflict with the decisions of other Courts of Appeal on the same matter, and forestalling as they did petitioner's opportunity to prove his innocence in a case based on suspiciously flimsy and contrived evidence, the rulings operated to deprive petitioner of a fair trial in the federal courts. See, *Kotteakos v. United States,* 328 U. S. 750, 765; *Potter v. United States,* 155 U. S. 438, 448.

The correct rule of law is most cogently stated in *Miller v. United States,* 120 F. 2d 968, 970 (C. A. 10, 1941):

> "Whenever the belief of a person or the motive of his act or conduct is material, he may not only directly testify that he had no intent to defraud, but he may buttress such statement with testimony of relevant circumstances, including conversations had with third persons or statements made by them, tending to support his statement that he had no intent to defraud."

Judge Hand rejected the label "self-serving" for such independent testimony in the Second Circuit, and added that "it was not fair to confine him (the accused) to a bare denial—never impressive in the mouth of the accused." *United States v. Matot,* 146 F. 2d 197, 198 (C. A. 2, 1944). Judge Lindley for the Seventh Circuit has recently adopted the Hand reasoning. *United States v. Bucur,* 194 F. 2d 297, 301 (C. A. 7, 1952). In an earlier decision in the same Circuit, it was held that the evidence of those accused on the issue of their state of mind "is to be weighed as other evidence, but on account of their intense interest their statements as to their intention are to be considered with great caution. For

this reason circumstantial evidence, as in all such cases must play an important part in the determination of that fact, and all circumstances which reasonably throw light upon that subject, either directly or indirectly, should be received in evidence on behalf of both the Government and those charged with crime." *Norcott v. United States*, 65 F. 2d 913, 919 (C. A. 7, 1933.[16] This reasoning, of course, underlay the opinion of Justice Jackson in *Morissette, supra*, p. 276.

In the case herein, the prosecution urged upon the jury consideration of the fact that petitioner had a reason for committing the offenses because petitioner was never entitled to receive a portion of the transcript. Petitioner testified that he believed he was entitled to receive the entire transcript, but the court instructed the jury that the petitioner was an interested witness and to consider on his credibility "all the matters that have been suggested to you in that connection." Thus, the prosecution received full opportunity to prove and urge motive and reason for commission of the offense, but petitioner was unable to support his own disparaged testimony by independent and cogent testimony proving his innocence. This Court, it is respectfully submitted, should not permit such unfair and erroneous construction of 18 U. S. C. 641 and the conspiracy statute to stand, when it is considered moreover that other Courts of Appeal have held such

---

[16]The trial court here instructed the jury: "The defendant has offered himself as a witness and has testified in the case. Having done so, you are to estimate and determine his credibility in the same way as you would consider the testimony of any other witness. It is proper to consider all of the matters that have been suggested to you in that connection, including the interest that the defendant may have in the case, his hopes and his fears, and what he has to gain or lose as a result of your verdict." [R. 472.]

rulings to be contrary to the fair administration of criminal justice in the Federal courts.[17]

B. The courts below, moreover, compounded the unfairness of the trial on the same issue by holding as a matter of law that petitioner under the circumstances of the case herein could not reasonably have supposed that he eventually would receive a copy of the entire transcript of the proceedings in which he was so directly involved.[18] Thus, as a matter of law the jury were instructed, in accordance with the view of the prosecutor, that petitioner had a reason and motive for committing the offenses. All efforts by the petitioner to have the trial court instruct the jury, on the issue of motive, as to the law concerning the right of interested persons to a transcript of a court of inquiry were unavailing. Indeed, no instruction was given to guide the jury on the state of the applicable law except the one sentence aforementioned which adopted the prosecution's theory of the case. *Cf. Bollenbach v. United States*, 326 U. S. 607.

The question assumes importance, not only because petitioner was deprived of the opportunity to prove absence of motive, and the jury instructed that motive did

---

[17]Reversals on the same issue followed, in addition to the above, in *Frank v. United States*, 220 F. 2d 559, 563 (C.A. 10, 1955); *Berkovitz v. United States*, 213 F. 2d 468, 473 (C.A. 5, 1954); *Heindel v. United States*, 150 F. 2d 493, 497 (C.A. 6, 1945); *United States v. Wicoff*, 187 F. 2d 886, 890 (C.A. 7, 1951); *Haigler v. United States*, 172 F. 2d 986, 988 (C.A. 10, 1949); *Hyde v. United States*, 15 F. 2d 816, 821 (C.A. 4, 1926); *Buchanan v. United States*, 233 Fed. 257, 259 (C.A. 8, 1916).

[18]The indictment describes the document as "a copy of the transcript of the proceedings of a United States Marine Corps Court of Inquiry convened to investigate charges made against certain Marine Corps personnel by defendant George E. Shibley." [C. Tr. 4.]

exist, but because it raises an important question of federal law which should be settled by this Court. Did the petitioner as a matter of military and civil law have the right to reasonably assume that a copy of the transcript of the proceedings of the Court of Inquiry would be available to him for his own use, or was the jury properly instructed that no basis in law existed for such belief other than that petitioner would eventually receive only that portion of the transcript in which he was actually involved? The question should be settled by this Court if the rights of civilians and military personnel, as well as their counsel, enmeshed in conflict with military courts, are to be preserved. See *Toth v. Quarles*, 350 U. S. 11.

The constitution and the course of proceedings of courts of inquiry are governed by the general statutes and by the common law military as received and practiced in the Army and Navy. 50 U. S. C., Section 731; Winthrop, *Military Law and Precedents* (1920), pp. 516-33; Davis, *Military Law of the United States* (1915), pp. 218-21; Snedeker, *Military Justice Under the Uniform Code* (1953), pp. 211-214. As it is a sworn body, and as the witnesses before it are sworn and examined and cross-examined as before courts-martial, it is a Board of a higher sort in the nature of a court, and thus has come to be termed a court in the law military. Winthrop, *supra*, p. 517. "A court of inquiry conducts its proceedings similar to those of a general court-martial." Snedeker, *supra*, p. 212.

Under the Uniform Code of Military Justice, "the convening authority of a court-martial or military commission or a court of inquiry shall appoint qualified reporters, who shall record the proceedings of and testimony taken

before such court or commission." 50 U. S. C. 592. The court of inquiry is required to keep a record of its proceedings, which must be authenticated by the signatures of the president, of the court and counsel for the court before being sent to the convening authority. 50 U. S. C. 731. The ultimate action taken by courts-martial and courts of inquiry may differ, but courts of inquiry rank equal in importance with courts-martial. The hearings of a court of inquiry include not only matters affecting the transactions of officers or soldiers, but they include "accusations or imputations, that is to say charges of error or misconduct." Winthrop, *supra*, p. 522. They are not secret bodies to be analogized to grand juries. Winthrop, *supra*, pp. 523, 528; see 50 U. S. C. 731.

To what extent are persons interested in the records of courts-martial or courts of inquiry entitled to a copy thereof? The regulations issued by the Department of the Navy[19] provide, in the first place, that "a court of inquiry is governed by the general principles of military law, applying analogous rules of a court-martial where they are applicable. The court will refer to the Manual for Courts-Martial, United States, 1951, adjudged cases, precedents, authoritative legal opinions, and approved books of legal exposition where there is no pertinent stated rule. The mission of the court must be given primary consideration in the determination of procedural questions not covered in these regulations." *Naval Supplement to the Manual for Courts-Martial of the United States* (1951), par. 0309, p. 35. The Manual for Courts-Martial, Section 82(g), p. 135 and the Uniform Code

---

[19]The Uniform Code of Military Justice defines "Navy" to include the "Marine Corps." 50 U. S. C. 551.

of Military Justice, 50 U. S. C. 629(c) provide that a copy of the record of the proceedings shall be given to the accused as soon as the original record is authenticated. "Congress felt it to be appropriate that each accused in such cases should have a copy of the record for his personal use. It is the duty of the trial counsel to furnish the accused with this copy. It is furnished without expense to the accused." Snedeker, *supra*, p. 411. Moreover it has been held that any person having an interest in the record of a naval court-martial on file in the Navy Department is entitled to have an exemplified copy of it after the proceedings are consummated by the action of the proper revisory authority. 1865, 11 Op. Atty. Gen. 137.

It will thus be seen that petitioner, situated as he was, could reasonably assume from the appropriate statutes, the Manuals, the Naval regulations, the legal precedents and text writers, that as an accused person facing prosecution for failure to answer the inquiries of the military court, he was entitled to receive a copy of the transcript of the proceedings for his own use. Moreover, no problem of security classification was involved and while, under the usual regulations, all records of the Naval Department were in the custody of the department, still it was provided in the regulations that the records of proceedings of "courts of inquiry" were always available, for the asking, to interested persons. "The Secretary of the Navy, or his designee, may make such records or information therefrom available to persons properly and directly concerned whether or not litigation is involved." *Federal Register*, December 12, 1951, pp. 12504-5.

The trial court, as noted above, declined to give any instructions along these lines on the issue of motive.

It implicitly recognized, however, that petitioner was reasonable in assuming that a copy of the transcript was available, but instead of giving petitioner's requested instructions, the trial court improvised the view that petitioner could only reasonably assume at all that he would get a portion of the transcript, and this view of the law alone was imparted to the jury.[20]

As a matter of military law there is no provision for an attenuated transcript of a military court. The intent of Congress in enacting the Uniform Code of Military Justice was to see that records of military courts should be verbatim, complete and authenticated. Snedeker, *supra*, p. 404, *et seq.* In any event, the test of reasonableness must be measured by the petitioner's situation. The petitioner at the proceedings before the Court of Inquiry had challenged its jurisdiction, alleging that it had been improperly convened for illegal purposes, and he had challenged the members of the Court for cause. 50 U. S. C. 731(d). To sustain this challenge, petitioner plainly would have been entitled to a copy of the entire transcript, not only that portion which involved him. See, *In re Yamashita*, 327 U. S. 1, 9; *In re Grimley*, 137 U. S. 147, 150; *Dynes v. Hoover*, 20 How. (U. S.) 65, 81; *Hiatt v. Brown*, 339 U. S. 103, 109; *United States v. Praeger*, 149 Fed. 474 (D. C. W. D. Tex.,

---

[20]The Court of Appeals below held that the "instruction given went beyond the required limits in presenting the theory of defendant" (App. A, p. 10), overlooking that the instruction was over petitioner's objections and in accordance with the law as stated by the prosecution in its summation to the jury.

1907). Petitioner also declined to answer inquiries by invoking the privilege against self-incrimination. Clearly he was justified in believing that he was entitled to receive the entire transcript of the proceedings in order to establish the "setting" which gave rise to his fears of prosecution. *Hoffman v. United States,* 341 U. S. 479, 487-490. Other grounds for declining to answer the inquiries were equally dependent upon an examination of the entire proceedings.[21]

The short of the matter is that petitioner was deprived of the opportunity in law and in fact from proving to the jury that he was innocent of the charges made against him, that he had no reason or motive for conspiring to receive, or receive, a purloined copy of the transcript of the proceedings in which he was involved. The result was obtained by ruling contrary to the decision of this Court in *Morissette* and the decisions of other Courts of Appeal in the same manner, and by a disregard and misconstruction of the Uniform Code of Military Justice, the rules and regulations thereunder, and the applicable military and civil law. The issues thus raised loom large in the administration of federal criminal justice and military justice and should be reviewed and settled by this Court.

---

[21]Indeed, in the subsequent contempt trial these issues were raised and the trial court ordered that the complete record be made available to petitioner throughout the trial and for his inspection. Record on appeal in *Shibley v. United States* in the Court of Appeals for the Ninth Circuit, p. 274, No. 14464.

B.

The Court below has so far sanctioned a departure from the accepted and usual course of judicial proceedings by the trial court herein as to call for an exercise of this Court's power of supervision.

II.

Failure to Grant a Motion for New Trial After an Undenied Showing That the Prosecution Had Suppressed the Evidence of an Essential Witness and That the Newly Discovered Evidence Clearly Exculpated the Petitioner Was a Denial of Justice, a Manifest Abuse of Discretion and a Deprivation of Petitioner's Liberty Without Due Process of Law in Violation of the Constitution.

The Court of Appeals below appears to have deemed the denial of a motion for a new trial on the basis of newly discovered evidence solely a matter for the trial court's discretion. Such a restrictive standard, in the light of the record here, appears contrary to the ruling of this Court in *Griffin v. United States,* 336 U. S. 704, and in conflict with the decisions of other Courts of Appeal on the same matter. *Benton v. United States,* 188 F. 2d 625 (C. A. D. C., 1951); *Coates v. United States,* 174 F. 2d 959 (C. A. D. C., 1949); *Arbuckle v. United States,* 146 F. 2d 657 (C. A. D. C., 1944); *Hamilton v. United States,* 140 F. 2d 679 (C. A. D. C., 1944); *Pettine v. Territory of New Mexico,* 201 Fed. 489 (C. A. 8, 1912).

This Court held in *Griffin* that as a matter of due process of law and fundamental fairness in the administration of justice, the denial of a motion for a new trial on the basis of newly discovered evidence cannot solely be a matter for the trial court's discretion. In remanding the case to the Court of Appeals for reconsideration, this

Court held that if the newly discovered evidence was admissible, the fair test was "whether it would not be too dogmatic, on the basis of mere speculation, for any court to conclude that the jury would not have attached significance to the evidence favorable to the defendant had the evidence been before it" (p. 709).

Moreover, as pointed out in *Benton v. United States*, this case contains special factors, which are adequate to bring the case within the broad provisions of Rule 33 of the Federal Rules of Criminal Procedure, 18 U. S. C., providing for the grant of a new trial "if required in the interest of justice." As Judge Fahy stated in *Benton:* "The provisions of Rule 33, permitting a new trial if required in the interest of justice, though temperately to be utilized, is broader in scope than the limitations which have been held applicable where the motion is based on newly discovered evidence." (p. 627).

What is involved here is not only a motion for a new trial based upon newly discovered evidence which completely exculpated petitioner, but a claim that the prosecution suppressed and concealed the exculpating testimony of the essential witness from petitioner and his counsel, as well as the trial court itself. On remand to the Court of Appeals in the *Griffin* case, that court in reversing and ordering a new trial, stated:

> ". . . the case emphasizes the necessity of disclosure by the prosecution of evidence that may reasonably be considered admissible and useful to the defense. When there is substantial room for doubt, the prosecution is not to decide for the court what is admissible or for the defense what is useful." *Griffin v. United States*, 183 F. 2d 990, 993 (C. A. D. C., 1950).

Where it is shown that prosecuting authorities have deliberately suppressed evidence favorable to an accused, or knowingly used perjurious testimony to obtain a conviction, a new trial must be granted because the constitutional mandate of due process of law and the fair administration of justice require it. *Pyle v. Kansas,* 317 U. S. 213; *Mooney v. Holohan,* 294 U. S. 103; *Cf., Communist Party v. Subversive Activities Control Board,* ..... U. S. ....., 76 S. Ct. 663. See also, *Berger v. United States,* 295 U. S. 78, 88; *McNabb v. United States,* 318 U. S. 332.

The uncontradicted record in this case required a grant of petitioner's motion for a new trial. The trial was a short one, less than five days from *voir dire* to verdict. The evidence against petitioner in support of the charges contained in the indictment came virtually entirely from a single witness, the alleged "co-conspirator and chief actor," whose testimony "was necessary to give continuity to the circumstances and was the sole support of a considerable portion of the case for the prosecution." (App. A, p. 6).

Opposed to the testimony of this disreputable witness was the testimony of petitioner, a reputable member of the Bar for two decades with unblemished character, a disabled war veteran [C. Tr. 24], and a man whose family life and position in the community were exemplary. Petitioner denied that he had committed the offense, and maintained that he had no reason or motive for committing the offense. His position was that his accuser had adopted the fantastic and impossible idea of stealing the transcript of the proceedings in which Thompson knew petitioner was involved, of attempting with a former investigator of a newspaper columnist, Thompson's roommate, to turn Thompson's action into a profit by mailing, registered return receipt, the copies of the transcript to

interested persons. The petitioner claimed that it was impossible to conceive that he would have been a party to such a bizarre overt machination, and that Thompson had finally agreed to testify against petitioner when it became clear that he, along with his roommate and the corporal, would all obtain absolution if the blame were fixed upon counsel.

It is in this context that the newly discovered evidence of Yvonne Fuller should be considered. Her testimony was of such personal nature and so related as to time and detail, that only she could know them; no one could have furnished the details to which she swore, and she related them before unimpeachable witnesses and under circumstances free from duress [C. Tr. 137-8]. Her testimony demonstrated that petitioner had been subjected to a patent frame-up.

The Court of Appeals below held that the testimony of this witness "could not be 'of such a nature that it probably would produce an acquittal'." (App. A. p. 8.) Clearly, this was a gross abuse of discretion and contrary to "the interests of justice." Nor can it be denied under the *Griffin* test that it was "too dogmatic, on the basis of mere speculation," for the court below "to conclude that the jury would not have attached significance to the evidence favorable to the defendant had the evidence been before it."

In addition, the United States was in control of this witness before the trial and knew her to be an essential witness. She had given a statement to the Federal agents and told them she had been with Thompson at the motel near the Marine Base on the day when the copy of the transcript was stolen. She told the officers of their meretricious relations. She told the prosecuting official that

she would not testify against petitioner when the prosecutor asked her if she would. All of this was unknown to petitioner and his counsel. She was concealed in the courthouse when the case was actually being tried, the prosecutor trivializing her testimony in the courtroom, stating to court and counsel that "the girl, *whoever she was,* is not on trial and that has no bearing on the issues involved here," and leading petitioner and counsel to believe that the witness would be produced, but that her testimony was so irrelevant that she later was not called at all.

It is submitted that this was deliberate and knowing suppression of essential evidence, fundamentally unfair and unjust, and a denial of due process of law. It was the duty of the prosecutor to bring forward all witnesses and facts to the court's and jury's attention so that a true consideration could be made in the interest of justice.

Berger v. United States, 295 U. S. 78.

The trial court summarily denied the motion for new trial without opinion. The Court of Appeals stated that the affidavit of Yvonne Fuller "apparently corroborated the testimony of Shibley and contradicted that of Thompson in some respect." (App. A, p. 7.) It stated, however, that the initial statement to the Federal agents and a statement obtained by the prosecutor just before the hearing on the motion showed some inconsistencies with Yvonne Fuller's testimony in support of the motion. But what the court overlooked was that neither statement, though varying in some details, purported to contradict Yvonne Fuller's detailed testimony as to her relations

with Thompson and the events which took place between Yvonne and Thompson concerning the appropriation of the copy of the transcript. All of Yvonne Fuller's testimony "corroborated" Thompson's guilt and absolved petitioner. That the jury would have "attached significance" to her testimony cannot be disputed.

The court below doubted that "reasonable diligence" had been employed. Yet, it is uncontradicted that the young girl had only been a maid in petitioner's home for about six months. She left petitioner's home on December 19, 1952 (the day when the copy of the transcript was missed), and at the time of the trial and for almost a year prior thereto the whereabouts of Yvonne Fuller were and had been wholly unknown to petitioner and his counsel [C. Tr. 136-39, 141-3, 145-6]. Neither petitioner nor his counsel had any reason to suppose that the former maid in his home had any knowledge of the facts involved here. The witness was therefore not "available" for any interview as the court below erroneously assumed. Nor does the record support the view that petitioner somehow waived his right to raise the claim of the suppression of the evidence of the witness because "if, as defendant claims, she was possessed of information favorable to his contentions, he should have called her." (App. A, p. 8.) The uncontradicted record shows that the witness was concealed, petitioner and his counsel knew nothing about her familiarity with the facts, and at the trial Thompson described her as a "lady friend" who knew nothing about his activities, and the prosecutor supported this illusion with the statement that "the girl,

whoever she was, is not on trial here." It was only after the verdict was returned, and while petitioner was hospitalized, that Mrs. Shibley was informed by a young man, a friend of Yvonne, who had been out of the State for a long time, that Yvonne might have knowledge of facts beneficial to petitioner [C. Tr. 137]. The motion for a new trial followed promptly thereafter.[22]

This Court, it is respectfully submitted, should review the substantial and important questions here presented. No injury could have come to anyone from giving petitioner the single opportunity he had to completely establish his innocence and expose the scheme contrived against him. The trial had been a short one, and a new trial could have been expeditiously completed. Involved on the motion was not only the claim that the evidence of petitioner's innocence was now clearly established, but that such evidence had been deliberately suppressed by the prosecution. Justice and the appearance of justice in a doubtful and questionable prosecution were involved. If "judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence" (*McNabb v. United States*, 318 U. S. 332), the rulings of the court below should be reviewed to avoid a grave miscarriage of justice reached contrary to constitutional and legal standards.

---

[22]Where a lower court has misconceived or overlooked the essential facts in the record, and rendered a decision which results in a gross miscarriage of justice or a subtle erosion of a statutory or legal principle, this Court has not hesitated to grant review. *Remmer v. United States*, 350 U. S. 377; *Chambers v. Florida*, 309 U. S. 227; *Williams v. Kaiser*, 323 U. S. 471; *Baumgartner v. United States*, 322 U. S. 665; Stern & Gressman, *Supreme Court Practice* (2d Ed., 1954), pp. 128-30.

C.

The court below has decided a federal question in a way in conflict with applicable decisions of this Court; has rendered a decision in conflict with the decisions of other Courts of Appeal on the same matter; and so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

III.

Measured by Standards Involving the Constitutional Rights of Citizens and the Rights and Duties of Civilian Counsel, the Evidence Herein Was Neither Competent Nor Substantial to Sufficiently Support the Verdict, and the Judgment of Conviction Thereon Deprived Petitioner of His Liberty Without Due Process of Law.

This Court has stated that "we have never hesitated to examine a record to determine whether there was any competent and substantial evidence fairly tending to support the verdict." *Mortenson v. United States*, 322 U. S. 369, 374. "Particularly is this so where a decision here for review cannot escape broadly social judgments—judgments lying close to opinion regarding the whole nature of our Government and the duties and immunities of citizenship." *Baumgartner v. United States*, 322 U. S. 665, 671.

The aforesaid legal and social questions are conjoined in the case herein. The first factor which should be noted herein is the context in which the case arises. The Court of Appeals below could not fail to notice this element.

> "Shibley, as lawyer, was employed as counsel for one Bennette in a court-martial proceeding. Prior to the termination of the pre-trial investigation therein, and on August 26, 1952, Shibley wrote a letter to the Commandant of the Marine Corps, complain-

> ing of the method by which the court-martial[23] was conducted at El Toro Marine Base. As a result of this incident and in connection therewith, a Court of Inquiry was convened at the Base, at which Shibley was summoned to testify. At these proceedings, Shibley was asked to detail the matters of which he had written the Commandant. He refused upon various grounds, the validity of which are not in question in this appeal. A copy of the official transcript of these proceedings is the subject matter of the crimes herein charged." (App. A, p. 3.)

As the Statement of the Case herein indicates, the aforesaid summary fails to note the bitterness and animosity of the military officials to petitioner, civilian counsel, for his aggressive defense of an enlisted man in the armed forces. Petitioner had a duty to perform and he performed it. He saw his client through to final vindication. He acted with entire devotion to the interest of his client and with a warm zeal not always understood or accepted by military officials accustomed to unquestioned acceptance of their conduct. The Uniform Code of Military Justice was enacted by Congress to meet the "criticism of the justice systems of the Army and Navy." 1950 U. S. Code Cong. Service, p. 2225. Command influence upon the personnel of military courts, and especially upon military counsel, was one of the primary reasons for the enactment of the law. 50 U. S. C. 591, 612, 613. The provisions of the law have nevertheless proved inadequate,

---

[23]No court-martial had yet been convened. The complaint was concerning the conduct of the military officials at the Marine Base while petitioner was representing his client in pre-trial investigation proceedings [C. Tr. 19].

still "allowing too much opportunity for the exercise of 'command influence'." Walker, *Military Law* (1954), p. 137. See also, Keefe and Moskin, *Codified Military Injustice* in 35 Cornell L. Q. 151, 158 (1949). While the presence of civilian counsel is therefore of invaluable aid in the protection of the constitutional rights and legal rights under the Uniform Code of Military Justice of members of the armed forces, it cannot be said that military command is enthusiastic about their appearances. See, Everett, *Military Justice in the Armed Forces of the United States* (1956), pp. 149-152. Petitioner's sharp criticism of military officialdom itself on behalf of his client evoked immediate arbitrary reprisal as aforesaid. Thereafter, he was the focus of military attention with the plain purpose of involving him in some punishable offense.

It is in this context, it is respectfully submitted, that the competency and substantiality of the evidence adduced against petitioner should be examined. It is important for the administration of military, as well as civil, justice that a conviction is not reached by insubstantial evidence with a resultant evasion of the principles of an independent Bar and of the rights of persons, and especially enlisted men in the Armed Forces, to the effective and fearless assistance of counsel. *Offutt v. United States*, 348 U. S. 11; *Cammer v. United States*, 350 U. S. 399. Especially is this true when it is considered that petitioner on technical grounds was denied the right to present undenied proof of his innocence and victimization.

The basis for the conviction rests entirely upon the tainted evidence of a single witness, a mental incompetent, a confessed thief, a sexual degenerate, and a person whose sordid self-interest was plain.[24] As was stated by this Court recently in *Gordon v. United States,* 344 U. S. 414, 417: ". . . where, as here, the Government's case may stand or fall on the jury's belief or disbelief of one witness, his credibility is subject to close scrutiny." Moreover, this sole witness as has been noted aforesaid had three times been committed to mental institutions and at the time he testified the witness was an adjudicated

---

[24]The Court of Appeals speaks of "corroboration" by the "corporal", the "photographer", the "postal inspector" and "other witnesses" (App. A, p. 4). There was testimony corroborating Thompson's guilt, but none connecting petitioner with the crimes. The corporal testified that he offered to help petitioner, petitioner never asked him to do anything wrong, he never saw petitioner thereafter; only Thompson [R. 56-108]. The photographer proved that Thompson concocted the idea of photographing the transcript, and the photographer never met or spoke to petitioner [R. 381-96]. The postal inspector proved only that Thompson and Fields, his roommate, themselves had mailed the packages registered return receipt [R. 225-28]. Fields did not claim that petitioner either had known of or spoken to him about obtaining a copy of the transcript prior to its disappearance. Thompson alone enlisted Fields' aid [R. 229-40]. Fields' claim that he spoke to petitioner after the records were mailed and that petitioner told him to leave town [R. 369-75] proved to be only the abortive attempt of a confirmed drunkard to fabricate some subsequent link with petitioner. The documents were mailed by Thompson and Fields days before Fields said he spoke to petitioner about the documents being in the mail [R. 225, 279, 263]. Fields never left town, and Thompson never testified that petitioner ever made such a request of him. Marvel Bloomquist, a "lady friend" of Thompson's, did not know petitioner and solely corroborated Thompson's meetings with the corporal [R. 241-45, 376-77].

incompetent, the judgment of incompetency never having been set aside.[25]

Without this single witness, there was not a scintilla of evidence to connect petitioner with the commission of the alleged offenses. Under such circumstances, viewed in the light of the presumption of innocence which accompanied the petitioner and the circumstances of the case, it is submitted, that the evidence was not sufficiently substantial to submit to the jury for its consideration. "If this type of testimony alone and uncorroborated should be held to convict a person of crime beyond a reasonable doubt such ruling would represent a new miiestone in Anglo-American jurisprudence. It would well lead in the direction of a police state in open defiance of the traditional personal safeguards of our federal constitution." *United States v. Haderlein,* 118 Fed. Supp. 346 (D. C. Ill., 1953). See, *Sykes v. United States,* 204 Fed. 909, 913 (C. A. 8, 1913); *Gillette v. United States,* 236 Fed. 215, 219 (C. A. 8, 1916); *Dahly v. United States,* 50 F. 2d 37, 44 (C. A. 8, 1931); *Johnke v. State,* 68 Neb. 154, 182, 104 N. W. 154, 158 (1903). *Cf., Bridges v. Wixon,* 326 U. S. 135, 155-6.

Moreover, the case against petitioner is unique because the internal structure of the evidence of this sole and disreputable witness was so torn apart by the *prosecution's own witnesses* that no reasonable mind could accept such evidence as adequate to support the conclusion reached

---

[25]The trial court gave the jury no instruction on the weight and credibility to be given to such witness, despite his manifest duty to do so where the entire prosecution case hinged on this single witness. See, *Screws v. United States,* 325 U. S. 91, 107; *Viereck v. United States,* 318 U. S. 236, 247-8; *Mills v. United States,* 228 F. 2d 645 (C.A.D.C., 1955).

below. *N. L. R. B. v. Columbian Enameling & Stamping Co.*, 306 U. S. 292, 299. Thompson's story rested on the claim that petitioner suddenly conceived the idea of photographing and mailing the copies of the transcript when Thompson showed petitioner a copy of the transcript on Saturday, December 20, and that it was not until Monday, when petitioner's secretary gave Thompson $200 (as allegedly requested by the photographer), that Thompson obtained the photographic copies. It should be noted that the prosecution did not call the photographer and his assistant on his direct case, although they were obviously important witnesses. It was only when the trial court doubted that Thompson's testimony was adequate [R. 174], that the prosecutor belatedly called the photographer and his assistant and these two *prosecution witnesses* testified that Thompson had consulted them prior to December 20 about photographing the transcript, that the sum agreed upon was $150 and that Thompson had paid that amount and taken away the documents [R. 381-99] *on Sunday, when petitioner's office was closed.* Thus, in measuring the substantiality of the case against petitioner, it appears that the prosecution presented evidence by two of its own witnesses that the testimony of the sole witness upon which it relied was a falsification. This is hardly "clear, convincing and unequivocal proof which does not leave the issue in doubt" nor the equivalent criterion, "proof beyond a reasonable doubt." *Klapprott v. United States*, 335 U. S. 601, 612.[26]

---

[26]Although petitioner was convicted of unlawfully receiving and arranging to receive the copy of the transcript of proceedings, it is not disputed that he never received such purloined copy. All he was sent through the mail was a photograph of the document alleged in the indictment. See, *United States v. Wainer*, 170 F. 2d 603 (C.A. 7, 1948).

Guilt is not proved by proving the accused innocent, and without substantial and competent evidence fairly establishing the essential ingredients of the offenses charged here, the judgments of conviction should not be permitted to stand if the liberty of petitioner is not to be lost without due process of law. *Hartzel v. United States,* 322 U. S. 680; *United States v. Falcone,* 311 U. S. 205; *United States v. Di Re,* 332 U. S. 581, 593; *United States v. Wainer,* 170 F. 2d 603 (C. A. 7, 1948); *United States v. Silva,* 131 F. 2d 247, 249 (C. A. 2, 1942).

Important questions therefore are presented here which require this Court's determination. It is important that civilian counsel representing personnel in the military courts should not be subjected to fabricated prosecutions for their advocacy on behalf of members of the armed forces or criticism of military officials. Where it is claimed that civilian counsel so circumstanced has committed an offense with respect to the transcript of proceedings in which counsel was involved with the military (a transcript worth less than $100 and for which counsel has been sentenced to three years imprisonment and possible conclusion of his legal career), exacting standards of proof should be formulated by this Court and should be met by substantial evidence in the record. Unless this Court speaks on these issues, there is danger that civilian counsel will either avoid appearances before the military or "bend the knee" with consequent frustration of the clear Congressional purpose in the enactment of the Uniform Code of Military Justice.

D.

The Court below has decided an important question of federal law which has not been, but should be, settled by this Court.

IV.

The Sentence of Three Years Imprisonment Imposed Upon Petitioner on the Conspiracy Count Was Illegal.

The general conspiracy statute, 18 U. S. C. 371, provides that if the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy should not exceed the maximum punishment provided for such misdemeanor.

The jury were instructed to make a specific finding as to the value of the copy of the transcript [R. 493]. The jury found the value of the particular copy of the transcript which was the subject matter of all the counts in the indictment to be less than $100 [C. Tr. 91].

18 U. S. C. 641 provides that if the value of the property does not exceed the sum of $100, the offense is a misdemeanor.

Insofar as Count "Four" of the indictment [C. Tr. 5] charged petitioner with conspiring with Thompson to unlawfully steal and receive the said transcript in violation of 18 U. S. C. 641, it follows that petitioner was only convicted of conspiring to commit a misdemeanor offense when the value of the document was fixed at less than $100 by the jury, and petitioner's sentence could not exceed the maximum sentence of one year on the conspiracy count. 18 U. S. C. 641; 18 U. S. C. 371.

The Court of Appeals below upheld the sentence on the ground that an additional object of the conspiracy as alleged in the indictment was to violate California

Penal Code, Sections 459 and 460. These sections punish as burglary any entry into a dwelling with intent to commit larceny.

This state offense "assimilated" into the federal law (18 U. S. C. 13) was also charged in the Count "One" of the indictment as a substantive charge [C. Tr. 2], it being alleged that Thompson committed the actual burglary and that petitioner "aided and abetted" Thompson. The jury returned no verdict against petitioner on this count [R. 573].[27]

There was no evidence in the record that petitioner conspired with Thompson to enter the Marine Base and commit burglary. The jury apparently could find no evidence that petitioner aided and abetted Thompson's burglary, and without proof of aiding and abetting, there is usually no basis for conviction of participation in a conspiracy. *Young v. United States,* 48 F. 2d 26, 27 (C. A. 5, 1931); *United States v. American Precision Products Corp.,* 115 Fed. Supp. 823, 826 (D. C. N. J., 1953); 11 Am. Jur., Conspiracy, Sec. 4.

Moreover, the only witness as to the alleged conspiracy to commit burglary was Thompson, and the prosecution evidence showed that as to the matter of entering upon

---

[27]Petitioner contends that the Assimilative Crimes Statute is unconstitutional and that if, as the courts below have held, the verdict as to Count Four encompassed a conspiracy to violate an "assimilated" California statute, then such verdict, being based upon an unconstitutional enactment, is illegal and must be reversed. See argument addressed to this point, *infra.*

the Marine Base, Thompson kept this a secret. Thompson testified that he spoke to petitioner on December 19 about the transcript (the day it disappeared), and petitioner allegedly asked Thompson only if he thought the transcript could be gotten and if Thompson knew what he was going to do [R. 126]. The corporal testified that he didn't know whether Thompson was going to make a copy of the record or purloin it [R. 75].

There was no evidence in the record, therefore, to justify a finding that petitioner had conspired with Thompson, or aided and abetted Thompson, in the specific commission of a burglary on the Marine Base. The only reasonable conclusion, therefore, is that the jury in its verdict as to Count Four had in mind no more than a conspiracy to receive in violation of 18 U. S. C. 641. If this conclusion, as it appears, is correct then the conviction was only that of conspiring to commit a misdemeanor. The maximum punishment for such offense is only one year. The jurisdiction of the trial court was exceeded and the judgment must, for that reason, be reversed. At least, this Court should settle the federal question involved.

E.

The Court of Appeals has decided a federal question which has not been, but should be, settled by this Court.

V.

18 U. S. C. 13, the Assimilative Crimes Statute, Inherently and as Construed and Applied Herein, Violates the Due Process Provision of the Fifth Amendment, Creates an Unequal Application of the Criminal Laws in the Different States and Territories and Invades the Reserved Powers of the States in Violation of the Tenth Amendment to the Constitution of the United States.

Petitioner was charged in Count Four, the "conspiracy" count of the indictment, with having conspired to violate the acts charged in the other counts. One of these counts charged burglary under the California statutes. While the jury failed to agree on this substantive count and while the prosecution's testimony, taken at its strongest, contains not one scintilla of evidence to the effect that petitioner entered into a conspiracy having burglary as one of its objects, nevertheless it was the view of the courts below that the conviction on the conspiracy count encompassed a conspiracy to violate the California burglary statutes. If the latter view of the courts below be assumed correct, namely, that it is not possible to tell from the verdict on just which alleged act of conspiracy the jury relied, then it must follow that if any portion of the "conspiracy" count be unconstitutional, then the entire judgment as to such count must be reversed. *Stromberg v. California* (1931), 283 U. S. 359.

It is respectfully submitted that the Assimilative Crimes Statute (18 U. S. C. 13), both inherently and as construed and applied in the case herein is unconstitutional in the following respects:

1. By the statute in question, Congress attempted to delegate to the state and territorial legislatures powers which are strictly and exclusively those of the Federal Congress alone. Not only does the statute purport to "assimilate" and incorporate wholly unspecified and unenumerated statutes of state and territorial legislatures already enacted, but the statute prospectively "assimilates" and incorporates acts of state and territorial legislatures not yet in existence. Such a broad, sweeping and all-inclusive delegation of legislative power is unconstitutional. *Wayman v. Southard*, 10 Wheat. 1, 6 U. S. 253; *Union Bridge Co. v. United States*, 204 U. S. 364.

2. Such a statute is violative of the Fifth Amendment to the Constitution of the United States in that it denies due process of law to any person sought to be prosecuted thereunder. The Assimilative Crimes Statutes does not define any crimes whatsoever and does not state what the punishment therefor should be. It fails completely not only to give due notice but any notice whatsoever of the offense or offenses wherewith a person may be charged thereunder or of the punishment to which he may be subjected. All crimes under the laws of the United States must be clearly defined by Congress and the punishments which they carry must be set out therein by Congressional

mandate. Not even Congress has the power to pass on omnibus statute such as the Assimilative Crimes Statute.

More than this, enforcement of the statute in question results in unequal and uneven enforcement of the laws since the "crime" condemned and the punishment therefor varies under the statute from state to state and territory to territory. Thus, what may be a "crime" under the statute as it is sought to be applied to a defendant in California may not be a crime with respect to a person in Arizona or Nevada. An act which may constitute a felony under the statute when it is applied in New York may be a misdemeanor in New Jersey and no crime at all in Arkansas.

3. The statute invades an area of criminal law exclusively reserved to the states under the Tenth Amendment to the Constitution of the United States.

Since it is elementary that the Federal Government is one of enumerated powers and that all powers not granted to it expressly or by necessary implication are denied to it and reserved to the states, it must follow that a statute such as the one here in question is beyond the jurisdiction of Congress and therefore unconstitutional and void. *McCulloch v. Maryland*, 4 Wheat. 316, 4 U. S. (L. Ed.) 579; *Ex parte Curtis*, 106 U. S. 371; *Chinese Exclusion case*, 130 U. S. 581; *In re Neagle*, 135 U. S. 1; *Martin v. Hunter*, 1 Wheat. 304, 4 U. S. (L. Ed.) 97; *Burton v. United States*, 202 U. S. 344.

F.

The courts below have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

VI.

The Conviction of Petitioner Principally Upon the Testimony of an Adjudicated Insane Witness, the Failure of the Court to Instruct the Jury as to the Weight and Credibility to Be Given the Testimony of an Adjudicated Insane Witness, the Coercion of the Jury's Verdict and the Exclusion by the Trial Court of Testimony as to the Reputation of an Adjudicated Insane Witness, Substantially Affected Petitioner's Right to a Fair Trial and Deprived Petitioner of His Liberty Without Due Process of Law.

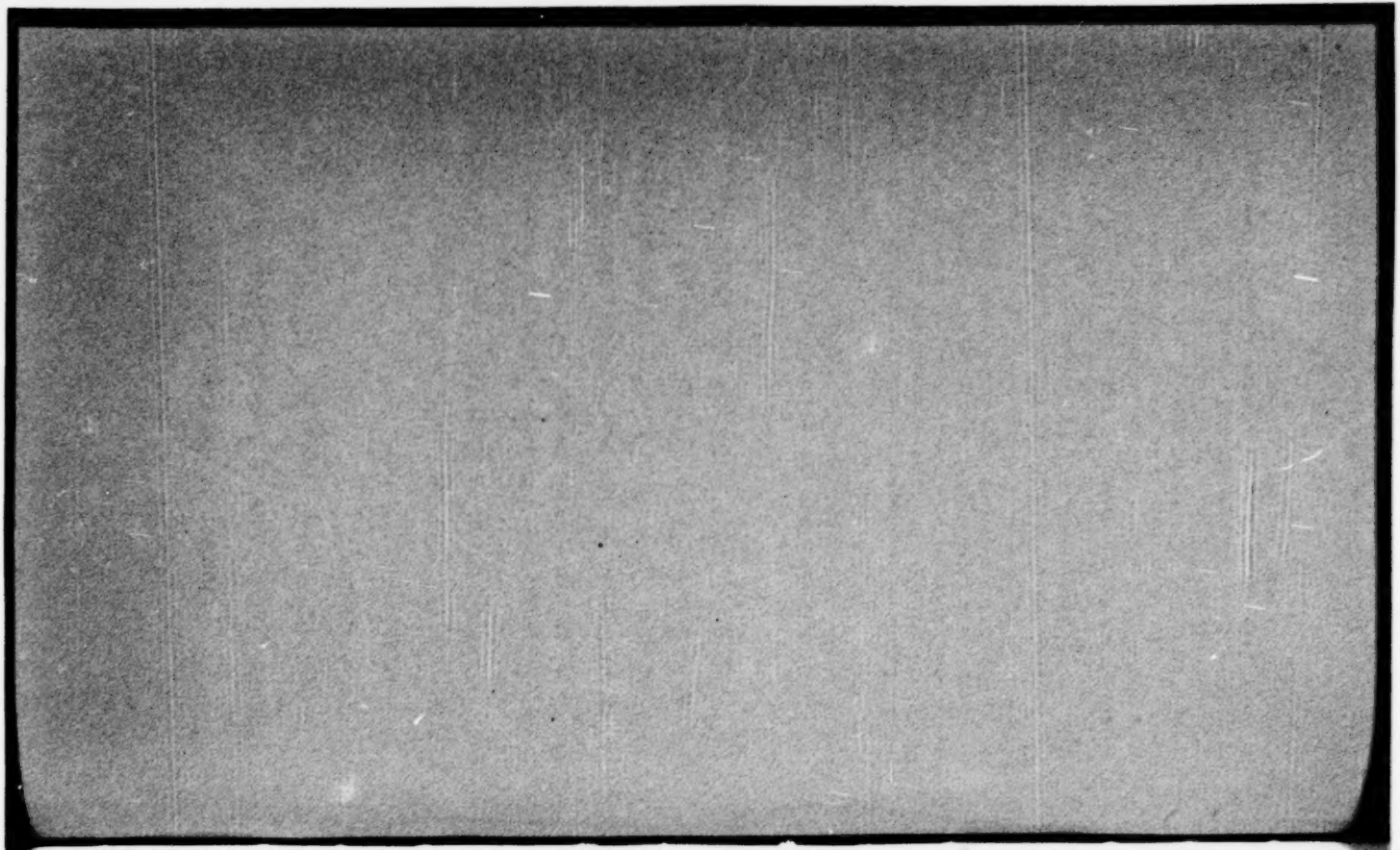
The errors referred to herein have been previously noted under the different points discussed in the argument above and are not again repeated in additional detail. These errors arose out of the fundmental misconception of the applicable law by the courts below and in their cumulative effect operated to deprive petitioner of a fair trial and his liberty without due process of law.

Conclusion.

For each and all of the foregoing reasons, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

MORRIS LAVINE,
A. L. WIRIN,
SAM ROSENWEIN,
DANIEL G. MARSHALL,
Attorneys for Petitioner.

JOSEPH A. BALL,
WALTER ELY,
GEORGE CHULA,
Of Counsel.



APPENDIX A.

Opinion of the Court Below.

United States Court of Appeals for the Ninth Circuit.

George E. Shibley, Appellant, vs. United States of America, Appellee.

No. 14,465, Mar. 19, 1956.

Upon Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Stephens, Fee and Chambers, Circuit Judges

James Alger Fee, Circuit Judge:

The indictment in this case was returned on June 25, 1953, against Shibley and Charles Raymond Thompson, and was in four counts. Count 1 charged violation of 18 U. S. C. A. §§ 7,[1] 13,[2] and California Penal Code

---

[1]"The term 'special maritime and territorial jurisdiction of the United States,' as used in this title, includes:

"* * *

"(3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building." 18 U. S. C. A. §7.

[2]"Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in Section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment." 18 U. S. C. A. §13. This section was adopted June 25, 1948, while §§459 and 460 of the California Penal Code, as they appear in Note 3, *infra*, were in effect.

§§ 459-460[3] namely, that Thompson entered a building on lands reserved for the exclusive use of the United States at El Toro Marine Air Station in Orange County, California, with intent to commit larceny therein. Shibley was charged with aiding and abetting Thompson in this offense. Count 2 set up a violation of 18 U. S. C. A. § 641,[4] in that appellant and Thompson stole and knowingly converted to their own use property of the United States valued in excess of $100.00. Count 3 charged the violation of 18 U. S. C. A. § 641, whereby Shibley and Thompson received, concealed and retained with intent to con-

---

[3]"Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, railroad car, trailer coach as defined by the Vehicle Code, vehicle as defined by said code when the doors of such vehicle are locked, aircraft as defined by the Harbors and Navigation Code, mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary." California Penal Code §459.

"1. Every burglary of an inhabited dwelling-house or building committed in the night-time, and every burglary whether in the daytime or night-time, committed by a person armed with a deadly weapon, or who while in the commission of such burglary assaults any person, is burglary of the first degree.

"* * *." California Penal Code, §460.

[4]"Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys, or disposes of any record, voucher, money or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

"Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

"The word 'value' means face, par, or market value, or cost price, either wholesale or retail, whichever is greater." 18 U. S. C. A. §641.

vert to their own use and gain property of the United States which the parties knew had theretofore been stolen from the United States, said property having a value in excess of $100.00. Count 4 charged a violation of the conspiracy statute, 18 U. S. C. A. § 371. This count charged that Shibley and Thompson conspired to (a) enter a building on lands reserved for the exclusive use of the United States with intent to commit larceny therein, in violation of 18 U. S. C. A. §§ 7, 13 and California Penal Code §§ 459-460, (b) steal, purloin and knowingly convert to their own use property of the United States of a value in excess of $100.00, and (c) conceal and retain with intent to convert to their own use and gain certain property of the United States which had been stolen from the United States, as each defendant then and there well knew, said property valued in excess of $100.00.

Thompson entered a plea of guilty to Counts 1 and 4 of the indictment before trial, and Counts 2 and 3 were dismissed as to him. Count 2 was also dismissed as to Shibley before trial. The cause was tried before a jury with Hon. Ben Harrison presiding. The jury failed to return a verdict on Count 1 as to Shibley, but did find him guilty on Counts 3 and 4. The jury also found the property involved had a value of less than $100.00. This appeal is from the judgment of conviction entered against Shibley on the verdicts returned.

Shibley, as lawyer, was employed as counsel for one Bennette in a court-martial proceeding. Prior to the termination of the pre-trial investigation therein, and on August 26, 1952, Shibley wrote a letter to the Commandant of the Marine Corps, complaining of the method by which the court-martial was conducted at El Toro Marine Base. As a result of this incident and in con-

nection therewith, a Court of Inquiry was convened at the Base, at which Shibley was summoned to testify. At these proceedings, Shibley was asked to detail the matters of which he had written the Commandant. He refused upon various grounds, the validity of which are not in question in this appeal. A copy of the official transcript of these proceedings is the subject matter of the crimes herein charged. A corporal in the Marine Corps, working as a clerk-typist and court reporter, offered to help Shibley, and the latter said Thomspon, the codefendant, would contact the corporal. Thompson found out from the corporal where the completed transcript would be placed and by use of false identification cards entered the base and stole the transcript of the Court of Inquiry. Thompson had several photographic copies made, for which he paid $200.00, which he claimed he got from Shibley's secretary. Thompson testified that, at the direction of Shibley, he mailed the original to a news commentator in Washington, D. C., the copy to the attorney who represented Shibley at the trial and the negatives to Shibley himself. There was independent evidence of the mailing of these three parcels, as directed, and of the payment of $200.00 for the photographing. The main framework of the case was laid by the testimony of Thompson, the co-defendant. He testified that he talked with Shibley about the matter every day and acted under the direction of Shibley. There was considerable corroboration in the testimony of the corporal, the photographer, the postal inspector, and other witnesses.

This represents one of those point appeals where lawyers urge each of the incidents of a hard fought criminal trial in the hope that the cumulative effect will convince an appellate court that the trial was unfair and the trial judge

partial to the government. At the outset, it may be said that, after a review of the record with the utmost care, this Court has come to the conclusion that the trial was fair and impartial. The clause was properly submitted to the jury for resolution of questions of fact involving direct and circumstantial evidence and depending upon the credibility which the jury chose to give to the witnesses, including the defendant.

The original brief of Shibley raises questions as to the validity of the judgment as follows: (a) No probative or substantial testimony in support of the judgment, so that the trial court erred in failing to grant motions for dismissal of the indictment and for acquittal; (b) Error in denying new trial on the suggestion of newly discovered evidence; (c) Exclusion of evidence claimed to show motive; (d) Refused instructions and instructions given in reference to the right of Shibley in re a transcript of a Naval Court of Inquiry; and (e) Denial of a right to fair trial and due process of law in that the trial court coerced the jury into a verdict of guilty. These will be discussed in the order set up.

A review of the record as a whole does not convince this Court that injustice was done by the conviction of defendant on Counts 3 and 4. The only question is the presence of substantial evidence in the record from which the jury could reach the conclusions it did. There can be no doubt that such was the case here. There was substantial evidence from which the jury could conclude beyond a reasonable doubt that defendant received, concealed and retained, with intent to convert to his own use and gain, the transcript of the Court of Inquiry, property of the United States, which had been stolen therefrom as defendant well knew. There was substantial evidence of

an unlawful agreement between Thompson and defendant to enter a building on lands reserved for the exclusive use of the United States, with intent to steal and convert to their own use property of the United States and thereafter to conceal and retain that property with intent to convert it to their own use and gain, then knowing it to have been stolen. There was unlawful concert of action toward the consummation of this criminal design, and several overt acts were committed in furtherence of the conspiracy. It is true the testimony of Thompson, as a co-conspirator and the chief actor, was necessary to give continuity to the circumstances and was the sole support of a considerable portion of the case for the prosecution. By attacking the credibility and competence of this witness in this Court, appellant seeks to vitiate the evidentiary basis for the verdict of the jury.

In the briefs, appellant has tried to point up certain minor inconsistencies in the testimony of Thompson, as if this Court were concerned with credibility. Of course, we are not. Gage vs. United States, 9 Cir., 167 F. 2d 122, 124. This argument might have had weight with the jury, but it is out of place in an appellate brief. The jury apparently found Thompson credible or, at least, corroborated. And, "where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes appearent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." Lavender vs. Kurn, 327 U. S. 645, 653. Belated attack is made also upon the competence of Thompson to testify at all. This aspect is dealt with below.

The experienced trial judge ruled several times that the evidence was sufficient and refused to set aside the verdict or to grant a new trial. While this circumstance does not bind this Court, yet, as the attitude of the trial judge was fair and impartial throughout and since he heard the evidence and observed the demeanor of the witnesses, including defendant, great weight must be accorded thereto.

A motion for new trial was made after verdict, based upon evidence which was claimed to be newly discovered. The trial court denied the motion. This is usually conclusive, as the only inquiry on the review of such a denial is whether or not there was a manifest abuse of discretion on the part of the trial judge. Rule 33, Federal Rules of Criminal Procedure. Banks vs. United States, 9 Cir., 147 F. 2d 628, 629; Gage vs. United States, 9 Cir., 167 F. 2d 122, 125. The new witness, Yvonne Fuller, was living in the home of defendant as a parolee to his wife from the Youth Authority, as a juvenile delinquent, at the time of the incidents related at the trial. Prior to the trial, the girl had given a statement to the government which tended to corroborate the other evidence in the case of the government. After the trial, she gave another statement to the attorneys for defendant, which apparently corroborated the testimony of Shibley and contradicted that of Thompson in some respect. This is claimed to be newly discovered evidence. Still a third statement, again inconsistent in certain particulars, was obtained by the government before the hearing on the motion. While confined in an institution for juvenile delinquents, she stated that she would not testify against George Shibley. It is apparent that counsel for defendant knew, during the trial, of the situation relating to this girl and the fact that she had been with Thompson the night on which he

obtained the transcript and that she was therefore probably aware of some of the incidents in controversy. In the face of this, it is contended that the information possessed by this person was not within the discovery of one employing reasonable diligence. This is, of course, open to grave doubt, and in any event it can be said that, considering the circumstances surrounding the girl, her testimony could not be "of such a nature that it probaly would produce an acquittal." Brandon vs. United States, 9 Cir., 190 F. 2d 175, 178. This person was available to defendant so that he could have availed himself of the opportunity to interview her. Then, if he had desired to use her at the trial, no objection could have been made. But it is obvious enough from the record that neither defendant nor the government wished to vouch for the credibility of this witness. Thus, unwilling, counsel for defendant apparently expected the government to call the Fuller girl to the witness stand. But the government did not. Defendant now assigns the failure of the government to use the Fuller girl as suppression of evidence. However, it does not come within any such principle. The government was not bound to call this witness and thereby proclaim her credibility. If, as defendant claims, she was possessed of information favorable to his contentions, he should have called her. His marked reluctance to do so is illuminating. One cannot speculate upon failure to call a witness and thereafter present such testimony as newly discovered.

Defendant offered testimony by his counsel in the present case that the lawyer had advised Shibley that the latter had a legal right to obtain a transcript of the proceedings before the Court of Inquiry and that the lawyer had examined a portion of the transcript in the office of

the United States Attorney. It is also contended that it was improper to exclude evidence that the transcript of a Court of Inquiry is always available to an interested person, and to instruct the jury to that effect. However, defendant was allowed to testify as to his belief upon these matters. Therefore, so far as motive was concerned, the proof was before the jury. His belief, and not the facts or the advice, was the important matter. Also, on the matter of his state of mind, defendant testified that he had knowledge of the fact that the transcript of his testimony before the Court of Inquiry had been forwarded to the office of the United States Attorney. He stated he knew on December 12 the transcript had been forwarded. He also testified that the record had been made available to his attorney for inspection because the latter had told him so on either December 15 or 16. Of course, this was sufficient to establish his point if the jury believed him. But the jury might have concluded, to the contrary, that he wished the transcript to be forwarded to the eastern news commentator before he had his copy, so that he could not be implicated personally in its publication. Shibley's interest in having the transcript used by a nationally known news commentator was obvious. Indeed, the only other persons who might plausibly have been thought to have had any interest therein were the news commentator and his agents. This was not concealed from the jury, but seems to have been carefully exploited. In any event, there was no error in the exclusions.

The trial court gave an instruction as to the right to have the transcript of the Court of Inquiry[5] and refused

[5]"The transcript of the Court of Inquiry proceedings affecting the Defendant Shibley, a copy of which defendant would eventually have been entitled to receive."

certain others requested by defendant. The instruction given was more than fair, and the right of the court to use its own language instead of that of defendant cannot be controverted. Certainly the trial court gave defendant ample opportunity to present this matter to the jury, and the instruction given went beyond the required limits in presenting the theory of defendant. That the jury did not accept it is no concern of an appellate court. Motive was not an essential element of the proof of the government. Even in the absence of any conceivable motive, defendant could still be convicted, such absence being only the foundation of a jury argument.

The court struck certain testimony with regard to the bad reputation of the witness Thompson. Since this witness clearly stated he was testifying to a time after finding of the indictment, the ruling was within the discretion of the trial court.[6]

The trial court refused to reprimand counsel for the government for an argument that thefts from government reservations might involve a threat to our national security. The fact is so obvious that the prosecutor might as well have let the jury draw the conclusion for themselves. There was no objection at the time. The trial court found no prejudice. On the record, it seems legitimate argument. It is highly persuasive here that the jury were conscientious and not swayed by prejudice against defendant (1) because they did not come to any agreement on Count 1, and (2) because they decided the value of the property was less than $100.00, contrary to the contention of the government.

There is objection that the trial court coerced the jury by giving an instruction which has become almost stock

---

[6]Wigmore on Evidence (3d Ed.), Vol. V, §1618.

under the circumstances.[7] In this case, a careful review of the seven volumes of transcript seems to indicate that no harm was done in this instance. There was no objection by defendant either in or out of the presence of the jury. Apparently the jury were able to come to an agreement on all counts except No. 1. The only effect of the instruction seems to have been that they returned a verdict on the other counts and left the one undecided.

There is also a contention that the sentence of three years imposed under the conspiracy count is illegal. It is said that 18 P. S. C. § 641 makes the knowing receipt, concealment and retention of stolen government property of a value less than $100.00 a misdemeanor only,[8] and a conspiracy with such a misdemeanor as its sole object is also a misdemeanor, punishable by imprisonment for not more than one year.[9] This, of course, ignores the fact that the conspiracy here charged and proved to ths satisfaction of the jury contemplated the commission of several offenses. But the conspiracy is the crime, not the substantive offenses which may or may not result therefrom. The fact that the jury did not pass upon the charges that Shibley actually aided and abetted in the felony of burglary, confessed by his co-conspirator, so as to make him a principal in the commission of that crime (18 U. S. C. A. § 2(a) does not relieve him from responsibility as a participant in a conspiracy looking to the

---

[7]Allis v. United States, 73 Fed. 165, 182, affirmed 155 U. S. 117; Allen v. United States, 164 U. S. 492, 501. See Kawakita v. United States, 9 Cir., 190 F. 2d 506, 521-528, affirmed 342 U. S. 932.

[8]Footnote 4, supra.

[9]"* * * If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor." 18 U. S. C. A. §371.

commission of that and other crimes. United States vs. Anderson, 9 Cir., 31 F. 2d 436, 437; United States vs. Dewinsky, 41 F. Supp. 149, 155.

On the day of argument in this Court, a memorandum of additional points was served after another counsel had been added to the battery. These points are: (1) The court failed, upon request of defendant, to poll the jury as to Count 4; (2) The conspiracy count combined a charge of the three substantive offenses in one charge; (3) Count 4 charged an offense under the "Assimilative Crimes Statute," 18 U. S. C. A. § 13, which is unconstitutional; (4) The competency of Thompson as a witness was affected by an adjudication of insanity, and the trial court should not have permitted him to testify; (5) Since what was received by Shibley was the negative of a photograph of the transcript of the Court of Inquiry, there could not be a conspiracy to "receive, conceal and convert" the original: (6) A discharge of a juror without a record of the consent of defendant thereto constituted double jeopardy; (7) Testimony contrary to "proven and uncontraverted physical facts" must be rejected; and (8) Testimony of a witness as to conversations with an alleged co-conspirator outside the presence of defendant should have been excluded. The objection to the method of raising these points is, of course, well taken and has been sustained. But, in order to demonstrate the lack of merit therein, this Court will pass categorically upon each.

The reference to the polling of the jury as to Count 4 is apparently the result of a clerical error which the reporter has now corrected. The point was raised by counsel who was not present at the trial. No objection was made at the time. No prejudice is apparent. A court has discretion as to how a jury should be polled.

It is said the conspiracy count is duplicitous. But two or more persons can enter into an unlawful agreement to commit three substantive crimes, either simultaneously or in succession.[10] It is claimed there could not be a conspiracy to commit larceny on a marine corps post, since this crime is defined under the "Assimilative Crimes Statute," which is unconstitutional.[11] But convictions of substantive crimes under this statute have been upheld.[12] A conspiracy to carry off government property, by breaking and entering a government building, and convert it to one's own use would be punishable as a felony irrespective of the Assimilative Crimes Statute.

It is objected in the additional points filed after argument that the testimony of Thompson was adversely affected by the fact that he had once been adjudicated insane and that the trial court should not have permitted him to testify. Of course, the rule of law is quite contrary,[13] and there was no error. The weight and credibility of his testimony was for the jury. Without question, there could be a conspiracy to "receive, conceal and convert" the original transcript, even if the conspirators were unable to get either original or copy. The crime planned need not be consummated if an alleged overt act

---

[10]"The conspiracy is the crime, and that is one, however diverse its objects." Frohwerk v. United States, 249 U. S. 204, 210. See Nye & Nissen v. United States, 9 Cir., 168 F. 2d 846, 850, affirmed 336 U. S. 613.

[11]18 U. S. C. A. §13. See Footnote 2, above.

[12]Dunaway v. United States, 10 Cir., 170 F. 2d 11, burglary; United States v. Gill, 7 Cir., 204 F. 2d 740, assault; Kite v. United States, 4 Cir., 216 F. 2d 802, uttering checks on insufficient funds; United States v. Titus, 64 F. Supp. 55, embezzlement.

[13]District of Columbia v. Armes, 107 U. S. 519, 521-522; Ross v. United States, 7 Cir., 93 F. 2d 950, 951-952; *In re* Paul, D. C., 18 F. 2d 448; Wigmore on Evidence (3d Ed.), Vol. II, §§492-501.

has been done in furtherance of and to carry out the illegal design. In any event, there was evidence that the original transcript was under the essential control and dominion of appellant from the moment it was presented to him, after the theft, by Thompson.[14]

The record shows a juror talked to the wife of one of the counsel for the United States. The court offered to discharge the juror and substitute an alternate. Rule 24(c), Federal Rules of Criminal Procedure. Counsel for defendant agreed, and the substitution was made. This action was not prejudicial to defendant and was not error. In any event, it was waived by expressed consent of counsel for defendant, as well as by the silence of defendant and his failure to object, although he is a lawyer. The suggestion that "testimony contrary to proven and uncontroverted physical facts" must be rejected is so vague and meaningless that it may be safely disregarded.

Finally, it was proper, after the prima facie showing of conspiracy and concert of action, to admit the testimony concerning conversations of a witness with a coconspirator outside the presence of the defendant Shibley. Barnett vs. United States, 9 Cir., 171 F. 2d 721, 722.

Of course, this case would not be here if the jury had taken the viewpoint of defendant. The refusal of the jury to believe Shibley is the heart of this appeal, since as we have seen, there certainly was no error of law. A reversal of this cause by this Court would be a completely unwarranted invasion of the province of the trial jury.

Affirmed.

(Endorsed:) Opinion. Filed Mar. 19, 1956. Paul P. O'Brien, Clerk.

---

[14]Wharton's Criminal Law (12th Ed.), Vol. II, §1238; United States v. Le Fanti, D. C., 255 Fed. 210, 212, affirmed Le Fanti v. United States, 3 Cir., 259 Fed. 460.

APPENDIX B.

Judgment of the Court Below.

United States Court of Appeals for the Ninth Circuit.

George E. Shibley, Appellant, vs. United States of America, Appellee.

No. 14,465.

JUDGMENT.

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed:) Judgment. Filed and entered March 19, 1956. Paul P. O'Brien, Clerk.

APPENDIX C.

Constitutional and Statutory Provisions Involved.

The Fifth Amendment to the Constitution provides, in part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

A. TITLE 18, U. S. C., Section 641:

> "PUBLIC MONEY, PROPERTY OR RECORDS
>
> Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or
>
> Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted . . .
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater. June 25, 1948, c. 645, 62, Stat. 725."

* * * * * * * *

B. TITLE 18, U. S. C., Section 371:

CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701."

* * * * * * * *

C. TITLE 18, U. S. C., Section 7:

SPECIAL MARITIME AND TERRITORIAL JURISDICTION OF THE UNITED STATES DEFINED

The term "special maritime and territorial jurisdiction of the United States", as used in this title, includes:

(1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, District or possession thereof, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

(2) Any vessel registered, licensed, or enrolled under the laws of the United States, and being on a voyage upon the waters of any of the Great Lakes, or any of the waters connecting them, or upon the Saint Lawrence River where the same constitutes the International Boundary Line.

(3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

(4) Any island, rock, or key containing deposits of guano, which may, at the discretion of the President, been considered as appertaining to the United States. June 25, 1948, c. 645, 62 Stat. 865."

* * * * * * * *

D. TITLE 18, U. S. C., Section 13:

LAWS OF STATES ADOPTED FOR AREAS WITHIN FEDERAL JURISDICTION

Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishable. June 25, 1948, c. 645, 62 Stat. 686."

* * * * * * * *

E. California Penal Code, Section 459:

"(Burglary Defined.) Every person who enters any house, room, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, railroad car, trailer coach as defined by the Vehicle Code, vehicle as defined by said code when the doors of such vehicle are locked, aircraft as defined by the Harbors and Navigation Code, mine or any underground portion thereof, with intent to commit grand or petit larcency or any felony is guilty of burglary. (Enacted 1872; Am. Code Amdts. 1875-76, p.111 Stats. 1913, p. 228; Stats. 1947, ch. 1052, Sec. 1.)"

* * * * * * * *

F. California Penal Code, Section 460:

"(Degrees of Burglary.) 1. Every burglary of an inhabited dwelling-house or building committed in the night-time, and every burglary, whether in the daytime or night-time, committed by a person armed with a deadly weapon, or who while in the commission of such burglary assaults any person, is burglary of of the first degree.

2. All other kinds of burglary are of the second degree.

3. This section shall not be construed to supersede or affect section four hundred sixty-four of the Penal Code. (Enacted 1872; Am. Code Amdts. 1875-76, p. 112; Stats. 1923, p. 747.)"

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes and rule involved	2
Statement	2
Argument	9
Conclusion	22
Appendix	23–25

CITATIONS

Cases:	
Benton v. *United States*, 188 F. 2d 625	19
Colosacco v. *United States*, 196 F. 2d 165, 229 F. 2d 880	20
Delaney v. *United States*, 263 U. S. 586	9
District of Columbia v. *Armes*, 107 U. S. 519	10
Franklin v. *United States*, 216 U. S. 559	21
Griffin v. *United States*, 336 U. S. 704	19
Hemans v. *United States*, 163 F. 2d 228, certiorari denied, 332 U. S. 810	21
Hollister v. *United States*, 145 Fed. 773	21
Kann v. *United States*, 323 U. S. 889	9
N. Y. Evening Post v. *Chaloner*, 265 Fed. 204	10
Nye & Nissen v. *United States*, 336 U. S. 613	20
Pinkerton v. *United States*, 328 U. S. 640	20
Sharp v. *United States*, 195 F. 2d 997	19
Shibley v. *United States*, No. 14,464, June 18, 1956 (C. A. 9)	4
United States v. *Cordo*, 186 F. 2d 144,148 (C. A. 2), certiorari denied *sub nom. Minkoff* v. *United States*, 340 U. S. 952	19
United States v. *Crowe*, 188 F. 2d 209	20
United States v. *Johnson*, 319 U. S. 503	9
United States v. *Johnson*, 327 U. S. 106	17
United States v. *Shibley*, 112 Fed. Supp. 734	12, 14

Statutes and Rule Involved: Page
18 U. S. C. 1 ---- 23
18 U. S. C. 7 ---- 23
18 U. S. C. 13 ---- 20, 21, 23
18 U. S. C. 371 ---- 20, 24
18 U. S. C. 641 ---- 20, 24
50 U. S. C. 731 ---- 14
Deering's California Penal Code:
Sec. 459 ---- 24, 25
Sec. 460 ---- 25
Sec. 461 ---- 25
Federal Rules of Criminal Procedure, Rule 33 ---- 19
Miscellaneous:
32 C. F. R., sec. 701.2 (b) ---- 13
8 Op. A. G. 223 ---- 14
25 Op. A. G. 623 ---- 14

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 243

GEORGE E. SHIBLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. A 1–14; 9 R. 3–14) [1] is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 19, 1956 (Pet. App. B 15; 9 R. 15), and a petition for rehearing was denied on May 9, 1956 (9 R. 16). On May 28, 1956, by order of Mr. Justice Douglas, the time for filing a petition for a writ of certiorari was extended to July 7, 1956, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

[1] The record is in 9 volumes and is not paginated consecutively throughout.

QUESTIONS PRESENTED

1. Whether there was sufficient evidence to support the verdict.

2. Whether, in the circumstances, the court's refusal to permit petitioner to introduce additional evidence as to his alleged lack of motive constituted prejudicial error.

3. Whether there was error in the court's charge to the jury.

4. Whether the court's denial of petitioner's motion for a new trial upon the basis of allegedly newly discovered evidence constituted an abuse of discretion.

5. Whether petitioner's three-year sentence under the conspiracy count was illegal.

6. Whether 18 U. S. C. 13 is unconstitutional because by incorporation it makes state criminal laws applicable in areas which are situated within a state but are under federal jurisdiction.

STATUTES AND RULE INVOLVED

The statutes (18 U. S. C. 1, 7, 13, 371, 641; California Penal Code, Secs. 459, 460, 461; and Rule 33, F. R. Crim. P.) appear in the Appendix, *infra,* pp. 23–25.

STATEMENT

After a jury trial on a four-count indictment, petitioner was convicted on two counts which charged him and co-defendant Charles R. Thompson with (1) receiving and converting property of the United States, *i. e.,* a copy of a transcript of proceedings of a United States Marine Corps Court of Inquiry, knowing it to have been stolen from the United States,

and (2) conspiracy to commit burglary in a building reserved for use of the United States, and to steal and receive and convert property of the United States (counts 3 and 4, 1 R. 4–5, 30).[2] Counts 3 and 4 alleged that the copy of the transcript had "a value of over $100.00" (1. R. 4–5), but under count 3 the jury found the value of the property to be "less than $100" (7 R. 574). Petitioner was sentenced to concurrent terms of imprisonment of one year on count 3 and three years on count 4 (1 R. 180). On appeal, the judgment of conviction was affirmed (Pet. App. B. 15; 9 R. 15).[3]

The transcript in question covered the proceedings of a Special Court of Inquiry which was convened on December 3, 1952, at the Marine Corps Air Station at El Toro, California, to investigate alleged administrative irregularities in the Service Squadron of Aircraft, Marine Forces, Pacific. The complaint which led to the inquiry was made by petitioner following court-martial proceedings at the Station in which petitioner, as a civilian counsel, represented a serviceman-

[2] Counts 1 and 2 charged petitioner with aiding and abetting codefendant Thompson to enter the Marine Air Station with intent to commit larceny and, together with Thompson, with stealing the transcript. On the government's motion prior to trial, count 2 of the indictment was dismissed. The jury made no finding on count 1 (1 R. 2–3, 84, 90, 91). R. 753, which states that the jury found petitioner guilty on count 2, appears to be a typographical error.

[3] Co-defendant Thompson pleaded guilty to count 1, which charged him as a principal in the entering of the Air Station with intent to commit larceny, and to the conspiracy charge in count 4 (1 R. 2; 4 R. 3–4). Upon the government's motion, counts 2 and 3 against Thompson were dismissed (4 R. 4–5).

defendant, one Master Sergeant Bennette (4 R. 51–52; 5 R. 219, 290–291). During the Court of Inquiry's session from December 3 through December 12, 1952, petitioner testified on five different days (5 R. 220) and was held in contempt 13 times (5 R. 221).[4] The transcript of the full proceedings, and copies thereof, were completed on December 19, 1952 (5 R. 201). One copy was placed in the filing cabinet in the legal office at the Air Station (5 R. 199, 201–202). The following morning, this copy was missing (5 R. 203–204). The charges involved here arose from this taking.

The evidence adduced at the trial concerning the circumstances of the taking of the transcript may be summarized as follows:

While the Special Court of Inquiry was in progress, a marine who had been petitioner's escort during the Bennette court-martial, Corporal Robert Huckenphaler, advised petitioner that he would be glad to assist petitioner in any way he could with respect to the Court of Inquiry. Petitioner advised him that a man named "Rusty" might contact him (4 R. 57–59). Shortly thereafter, petitioner asked co-defendant "Rusty" Thompson to contact Huckenphaler. Thompson did so. At that time, Huckenphaler stated to Thompson that he would be glad to help petitioner

[4] Subsequently, petitioner was indicted on the contempt charges. He was acquitted on some counts; the jury did not bring in a verdict on the remaining counts. Petitioner was subsequently tried and convicted on contempt charges arising out of that trial and sentenced to thirty days. This judgment of conviction was affirmed on appeal but the case was remanded for reconsideration of the sentence, in view of the sentence here (*Shibley* v. *United States*, No. 14,464, decided June 18, 1956 (C. A. 9), not yet reported).

in any way he could, since he did not feel that petitioner had been treated fairly; that he was working in the legal office of the Air Station; that he had access to certain records, copies of which he might be able to obtain for petitioner; and that he was working on the transcript of proceedings of the Court of Inquiry (4 R. 59–60, 64–67, 116–118). Thompson told Huckenphaler that he was working for petitioner, and that The Judge Advocate General, certain Senators, and Drew Pearson were interested in the outcome of the Court of Inquiry (4 R. 65, 91). At their next meeting, the two discussed the transcript of the Court of Inquiry proceedings (4 R. 69, 119–120). On or about December 12, 1952, Huckenphaler advised Thompson that the transcript would be ready for distribution in about a week; told Thompson that a copy would be located in a bottom drawer of a filing cabinet in the central office; and advised him of the location of the central office, the plan of the building and the location of the necessary keys (4 R. 71–74, 120–123). During all of this time, Thompson kept petitioner informed as to the details of his conversations with Huckenphaler (4 R. 118, 120, 124).

On December 19, 1952, Thompson told petitioner that the records would be available that night (4 R. 125–126). When petitioner asked him if the transcript "could be gotten", Thompson said "yes". Petitioner then asked him if he had "everything pretty well in mind" and told him not to forget to wear his gloves (4 R. 126). Thompson, dressed in a marine sergeant's uniform, went to Huckenphaler, who advised him that the liberty and identification

cards which Thompson showed him would get him into the Air Station (4 R. 75–76). Thereafter, Thompson successfully entered the Air Station and removed from the bottom of the filing cabinet a copy of the transcript covering the full proceedings of the Court of Inquiry (4 R. 128–129).

The following morning, on December 20, Thompson brought the copy of the transcript to petitioner at his home. Petitioner told him that he could not keep the transcript around the house, glanced through it, and told him that he would like a copy of it (4 R. 129, 5 R. 189). Thompson took the copy with him and had two photographic copies made.[5] The following day, he took the transcript, the photographic copies, and the negatives to petitioner (5 R. 173–175). Petitioner told Thompson to mail the negatives to him, so that he could have a legitimate excuse for having them. He also told Thompson to mail one copy to his attorney, Mr. Marshall in Los Angeles, and the original to Drew Pearson (5 R. 178, 6 R. 401). Petitioner advised the use of a Santa Ana return address, rather than Long Beach where he lived, since such a return address would suggest that the mail was sent by a marine (5 R. 193). The packages were wrapped in Christmas paper, covered with heavy paper, and Thompson and his roommate, Pat Fields, addressed and mailed them in accordance with petitioner's instructions (5 R. 179–181, 193, 236–237).

---

[5] Thompson said that the photographing cost $200 which he obtained from petitioner's secretary on Monday, December 22 (5 R. 191–192). Petitioner's secretary denied that she ever gave the money to Thompson (5 R. 262). See further summary of her testimony, *infra*, p. 9.

After petitioner received the package addressed to him, Thompson went to his office. Petitioner cautioned him not to say anything, as he usually did because of his suspicion that his office was wired, and then picked up the conversation, expressing his surprise at receiving the negatives of the transcript. Thompson replied that he did not know where the negatives came from and that petitioner had more friends "over there" than he thought (6 R. 401–402).[6]

Fields, Thompson's roommate, testified that in December 1952 he was Drew Pearson's employee, and that he participated with Thompson in the addressing and mailing of the packages. He said that subsequently, when he saw petitioner on the street, he remarked to him in passing, "Those packages that you wanted mailed are in the mail". Petitioner replied, "Thank you", and told Fields to get out of town for a few weeks (5 R. 235, 240; 6 R. 371).[7]

Petitioner testified that he first met Thompson in October 1952 (5 R. 295), when the latter was em-

---

[6] Except for the conversation between Huckenphaler and petitioner, the foregoing evidence, where it directly implicated petitioner, was provided solely by Thompson's testimony. But other parts of the foregoing testimony were corroborated by Huckenphaler (4 R. 58–76), by a girl who was Thompson's companion on one of his visits to Huckenphaler (5 R. 241–244), by a post office inspector (5 R. 224–227), and by the photographer and employee who made copies of the transcript (6 R. 378–399). When Thompson was first questioned by the police about the stolen documents, he said that petitioner had nothing to do with the stealing (5 R. 184).

[7] Fields testified that he addressed the package to petitioner under the name of "Shivley" (5 R. 238) but post office records show that petitioner's name was spelled correctly as "Shibley" (5 R. 228).

395667—56——2

ployed by Captain Worley's private detective agency, which petitioner used in connection with his legal work, and that Thompson visited his home frequently as an uninvited guest (6 R. 337). Petitioner said that when Huckenphaler talked to him and told him that he would like to help him, petitioner discouraged him, but Huckenphaler insisted and gave his name and address. Petitioner said that he thereafter asked Thompson to see Huckenphaler, and Thompson reported that his conversation with Huckenphaler netted nothing but "gossip" about petitioner's case (5 R. 297–303, 6 R. 336). Petitioner denied that he had ever retained Thompson in connection with the Court of Inquiry proceedings (5 R. 303–304), that he had ever asked Thompson to obtain a copy of those proceedings (5 R. 305), and that he even saw Thompson on December 19, 1952 (5 R. 305).

Petitioner said that on December 20, 1952, Thompson came to his home and showed him a copy of the transcript; that, when petitioner asked him where he had obtained it, he said that it was legal; that he (petitioner) refused to take it; and that thereafter he did not see that transcript (5 R. 306–307). He denied that he requested Thompson to make copies of it or that he or his secretary paid him to make copies (5 R. 307–308). He denied that he had the conversation with Fields to which Fields testified (6 R. 319–320).

Petitioner further testified that on December 24 he received a Christmas-wrapped package which contained negatives of the transcript (5 R. 308–309), and

that subsequently, through Captain Worley's office, he had copies made from the negatives and mailed them to another attorney who was representing him (5 R. 309). He said that he did not know, then or later, that the transcript covered by the negatives was stolen from the Air Station (6 R. 335).

Petitioner's secretary testified on his behalf that in January 1953 petitioner had copies of the transcript made from the negatives which he received by mail. She stated that the copies were made by Thompson through Captain Worley's office; that she paid Thompson for them by check, but charged the check to another case in the office; and that she first learned in February 1953 that the negatives covered stolen documents, when a corporal who had been questioned by the Office of Naval Intelligence told her and petitioner about it (6 R. 359–361, 365, 366–367).

ARGUMENT

1. There is no occasion for this Court to review, as urged by petitioner (Pet. 48–54), the concurrent findings of the courts below that the evidence was sufficient to support the verdict (*Kann* v. *United States,* 323 U. S. 88, 93; *United States* v. *Johnson,* 319 U. S. 503, 518; *Delaney* v. *United States,* 263 U. S. 586, 588–590). Petitioner does not deny that his conviction was amply supported by the evidence if Thompson's testimony is taken into account. His argument, in substance, is that Thompson's testimony should be discounted because Thompson had once been confined in a mental institution and because that testimony

was not corroborated in every detail.[8] But the fact that Thompson's testimony is the only evidence which directly implicated petitioner certainly is no basis for reversal. The credibility of witnesses was a matter for the jury to determine under appropriate instructions. Such instructions were given, with a specific caution that the testimony of Thompson, an accomplice, should be carefully scrutinized (7 R. 471–472, 475, 477). Defense counsel cross-examined Thompson on his prior confinement for mental illness (5 R. 166–169) and this evidence was before the jury when it considered Thompson's credibility. Thompson's past mental illness did not affect his competency as a witness and he was properly allowed to testify. *District of Columbia* v. *Armes,* 107 U. S. 519; *N. Y. Evening Post* v. *Chaloner,* 265 Fed. 204 (C. A. 2).

2. During the trial, the court sustained the government's objection to certain questions addressed to Mr. Marshall, an attorney first retained by petitioner while the Court of Inquiry proceedings were in progress (5 R. 275–276). The defense offered to show that Mr. Marshall advised petitioner that "if proceedings were filed against him in the Federal Court for contempt of the Court of Inquiry that he would be entitled to a transcript of the proceedings" (5 R. 282–

[8] The discrepancies in the testimony of the government witnesses to which petitioner refers dealt with Thompson's negotiations with the photographer in making copies of the transcript. For example, Thompson testified that he paid the photographer on Monday, December 22, 1952, for the photographs of the transcript, whereas the photographer testified that he received the money on Sunday, December 21, just after he finished the job (5 R. 191, 6 R. 396, 399).

283). This line of inquiry was not permitted. However, Mr. Marshall was allowed to testify that on two occasions after December 10 (the first of these on December 16th or 17th) he visited the office of the United States Attorney and was given access to a portion of the testimony (5 R. 276–277).

Petitioner himself testified that on December 10, 1952, it was his opinion as a lawyer, based upon his research, that he had an absolute right not only to read, inspect and copy the full record of the proceedings of the Court of Inquiry, but that he was also entitled to be furnished, free of charge, a copy of the record. He testified that he had a conference with his attorney in which this matter was discussed (6 R. 316–317, 344). He also testified that he knew, prior to December 19, 1952, that his attorney, Mr. Marshall, had been permitted by the United States Attorney to inspect the Court of Inquiry transcript and that, until March 1953, he believed that the transcript which Mr. Marshall inspected was a full transcript, rather than only a portion of the transcript covering petitioner's testimony (6 R. 317–319).

The President of the Court of Inquiry testified that petitioner requested a copy of the transcript and that he informed petitioner that he would have to investigate the legality of providing him with a transcript before making a decision on the request (4 R. 52).

In its final instructions to the jury, the court said (7 R. 476):

> The transcript of the Court of Inquiry proceedings affecting the defendant Shibley, a copy of which defendant Shibley would eventually

> have been entitled to receive. However, you are not to conclude from the fact that the defendant Shibley would eventually be entitled to such record that he or anyone else would be entitled to unlawfully remove or conspire to remove said record from the Marine base. Motive or absence of motive is merely a circumstance for your consideration along with all the other facts and circumstances in the case.

The court then went on to charge that proof of motive was not an essential element of the crime, but that it was valuable evidence to be considered (7 R. 476–477).

Petitioner contends (Pet. 31–35) that the court's refusal to permit Mr. Marshall to testify that he advised petitioner that he had a right to the transcript prevented him from establishing lack of motive by independent evidence. But the offer of proof was not that Mr. Marshall told petitioner that he had an absolute right to the full transcript, but merely that petitioner would have a right to the transcript if contempt proceedings were instituted against him.[9] The important issue on motive, moreover, was not petitioner's rights as a matter of law but his belief as to his legal rights. When petitioner himself testified, he did not claim that he relied on Mr. Marshall's advice, but rather that he reached his conclusion from his own study of the law. The excluded testimony had thus only a remote bearing on the issue of lack of

---

[9] Contempt proceedings were not commenced against petitioner until January 28, 1953. See *United States* v. *Shibley*, 112 Fed. Supp. 734, 738 (S. D. Cal.); the acts here involved were committed in December 1952.

motive, and was at most only cumulative on a matter as to which evidence was fully presented to the jury.

3. Petitioner endeavors (Pet. 35–41) to interpret the portion of the charge quoted above, *i. e.* that petitioner would eventually have been entitled to receive a copy of the "transcript of the Court of Inquiry proceedings affecting the defendant Shibley," as a direction to the jury that he would have been entitled to receive only the portion of the transcript relating to his own testimony.[10] It is argued that the court thus implied a motive to secure the *full* transcript illegally. Neither the precise language used, nor normal usage and understanding, support this over-refined contention. The words "affecting the defendant Shibley" described the Court of Inquiry proceedings in question, and that is all. The jury was thus told, in general terms, that petitioner would eventually have been entitled to receive a copy of the transcript affecting him. As the Court of Appeals stated, his position was adequately presented to the jury and, indeed, the charge may well have been more favorable to petitioner than was his right.

Navy regulations (32 C. F. R., section 701.2 (b)) provide that records of Navy Courts of Inquiry are confidential, and that the Secretary of the Navy *may*

[10] Petitioner had requested an instruction that the "transcript of the Court of Inquiry proceedings was a public record a copy of which the defendant Shibley would eventually have been entitled to receive" (7 R. 496–497). It is on the change of phraseology to "transcript of the Court of Inquiry proceedings affecting the defendant Shibley" that petitioner's argument is based. The argument on this aspect of the case was not held before the jury (see 7 R. 495–497).

make such records available to persons properly and directly concerned, whether or not litigation is involved. Courts of Inquiry are not court-martial proceedings, but are special, advisory, non-judicial inquiries of the executive branch of the government concerning administrative matters. Such proceedings are either closed or open depending on the convening authority. See 50 U. S. C. 731; 25 Op. Atty. Gen. 623; 8 Op. Atty. Gen. 223, 335; *United States* v. *Shibley*, 112 F. Supp. 734, at pp. 742–743. In this case, the proceedings were ordered closed. Until the contempt indictment was returned on January 28, 1953 (*United States* v. *Shibley*, 112 F. Supp. 734, 740), it is doubtful that petitioner was entitled by right to any part of the transcript. And, although petitioner states (Pet. 40, fn. 21) that the trial court in the *Shibley* contempt case ordered the government to make the complete copy of the transcript available to petitioner, the opinion in *United States* v. *Shibley*, 112 F. Supp. 734, 740, indicates only that the "proceedings before the Court of Inquiry on the dates on which the defendant appeared, and certain documents attached thereto" were tendered in the trial court in response to petitioner's motion for a bill of particulars.

4. Petitioner filed a motion for a new trial on the ground of newly discovered evidence (1 R. 123–126). Attached to the motion were affidavits stating that, although Miss Fuller (the "new" witness) had worked for the Shibleys during December 1952 and although defense counsel learned during the trial that she was in Thompson's company on the night of December 19,

1952 (the date of the commission of the acts in question), the defense was unaware until after the trial that she had any information material to the defense (1 R. 128–144).

Miss Fuller's affidavit dated January 14, 1954, states that, without petitioner's knowledge, she had been dating Thompson while she was living with the Shibleys; that she spent the evening and night of December 19, 1952, with Thompson; and that Thompson advised her that he was going to obtain some documents illegally but that he was protected since he could "always pin it on someone else". She also states that Thompson told her that, on obtaining the documents, he would get a "lot of money" from "big newspapers"; that, during the night, Thompson went out and returned with the papers; that, later the following day, while she was at petitioner's home, Thompson came to see petitioner, had an argument with him and left; that, still later, he told her that, when he showed the documents to petitioner, petitioner treated him like a criminal and booted him out of the house; and that afterwards Thompson "acted like he hated George [petitioner], like he wanted to get George in trouble"; and that Thompson made her promise that she would not tell petitioner anything about the stolen documents or that photographs of them had been made. She states that Thompson gave her the documents, photographs and negatives to keep in her home and told her that, if anyone discovered them, she could say petitioner gave them to her. She states that she had been questioned by the government on this matter, and that she told the government that

she would not testify against petitioner and that petitioner knew nothing about the documents (1 R. 145–156).

The government filed counter-affidavits stating that, when Miss Fuller was questioned in May 1953 by members of the Office of Naval Intelligence, she signed a statement declaring that in December 1952 she heard petitioner and Thompson talk about needing some papers from the El Toro Air Station; that, when she was with Thompson on the night of December 19, he told her that he was going to the Air Station to get papers which petitioner needed; and that, when Thompson arrived at petitioner's house the following day, he handed the papers to petitioner. The government affidavits also stated that in November 1953 Miss Fuller told Assistant United States Attorney Bowler that she absolutely refused to testify against petitioner and that, when she was warned about contempt proceedings, she replied that she was a minor and already in custody (1 R. 158, 160–177).

A later affidavit by Miss Fuller, dated January 22, 1954, stated that she spent the evening and night of December 19, 1952, with Thompson and that Thompson picked up some papers, but that she did not know that these papers had anything to do with petitioner. She expressly retracted as not "true" prior statements that she had heard an argument between petitioner and Thompson and that she had seen Thompson hand the papers to petitioner (8 R. 2–3).

Upon the basis of the affidavits and counter-affidavits, the trial court denied petitioner's motion (1 R.

178). Petitioner challenges this action as an abuse of discretion (Pet. 41–48).

As this Court observed in *United States v. Johnson,* 327 U. S. 106, where a trial judge who conducted the trial has considered the affidavits and counter-affidavits on a motion for a new trial grounded on newly discovered evidence, and has denied the application, it is not ordinarily the function of an appellate tribunal to review his findings. In the *Johnson* case, as in the instant one, an attempt was made, on a motion for a new trial, to impeach the credibility of a trial witness. This Court held (p. 111) that it is "important for the orderly administration of criminal justice that findings on conflicting evidence by trial courts on motions for new trial based on newly discovered evidence remain undisturbed except for most extraordinary circumstances * * *." We submit that no such circumstances exist here.

The evidence was not newly discovered after the trial. Huckenphaler testified that Thompson came to his home on the night of December 19 with a girl named Yvonne (4 R. 74). On Thompson's redirect examination, government counsel elicited information that the girl who accompanied him on December 19, 1952, was Yvonne Fuller, who was living at petitioner's home (5 R. 188–189). In cross-examining Thompson, defense counsel asked whether the young lady who was with Thompson before he stole the documents was a narcotics addict (5 R. 171–172). After the foregoing testimony was adduced, on Thompson's re-cross-examination, the following occurred (5 R. 195–196):

Q. Mr. Thompson, this lady whom you say you were with that night, the night of the 19th, that little girl was a little girl that had been paroled to Mrs. Shibley, the young lady sitting right here in front of me, by the Youth Authority of this State?

MR. BOWLER: That is objected to as calling for a conclusion of this witness.

THE COURT: I don't think that is proper, counsel. You must remember there is only one person on trial in this case now.

MR. BALL: That is correct. Let me say this: That little girl was working as a maid in that home.

THE COURT: Let us not discuss her.

MR. BALL: But he tried to bring out she was living there in Shibley's house. We want to show the situation.

MR. BOWLER: You can't show it by this witness. You might be able to show it by other witnesses.

THE COURT: Is she here?

MR. BOWLER: She is available, your Honor, and we will have her here.

MR. BALL: I won't pursue the question then.

THE COURT: I think you are getting on dangerous ground, counsel.

* * * * *

Petitioner thus was aware that Miss Fuller, who was very well known to him, might have information about the night in question, and he could have interviewed her if he had chosen to do so.

Petitioner's assertion that the government concealed the exculpating testimony of an essential witness is not founded in fact. Miss Fuller's statements to the in-

vestigating officers implicated rather than exculpated petitioner, but the government did not choose to use her as a witness because of her expressed hostility and unwillingness to testify. Moreover, Miss Fuller's affidavit was "much less than enough to show any abuse of discretion in the denial of the motion." *United States* v. *Cordo,* 186 F. 2d 144, 148 (C. A. 2), certiorari denied *sub nom. Minkoff* v. *United States,* 340 U. S. 952; cf. *Sharp* v. *United States,* 195 F. 2d 997, 998 (C. A. 6); see also Rule 33, F. R. Crim. P. At most it tended to impeach the credibility of Thompson and it was changed shortly after it was made.[11]

5. The conspiracy count on which petitioner was sentenced to three years' imprisonment charged a conspiracy between him and Thompson to commit (1) the felony of burglary as defined under California law and made applicable to lands reserved to the United

[11] The asserted conflict between the instant decision and the decision in *Griffin* v. *United States,* 336 U. S. 704, is not borne out by the facts. In *Griffin,* unlike this case, the evidence described in the motion was in fact new evidence, favorable to the defendant and known, but withheld, by the government. The other cases cited by petitioner (Pet. 41), except for *Benton* v. *United States,* 188 F. 2d 625 (C. A. D. C.), also involved what can be classified as new evidence, unlike that in the instant case. In *Benton* v. *United States,* involving alleged abuse of a minor, a new trial was granted to permit testimony by the victim's (a twelve year old girl's) mother which impeached the testimony of the victim whose sole evidence implicated the defendant. The mother's testimony was of central and critical importance and the "special factors" involved in the case were deemed to require a reopening (p. 627). The court also emphasized that the motion was filed within five days and might be granted under Rule 33, which is "broader in scope than the limitations which have been held applicable where the motion is based on newly discovered evidence" (*ibid.*).

States by 18 U. S. C. 13 (*infra*, p. 23), and (2) to receive, conceal and convert property of the United States, knowing it to have been stolen in violation of 18 U. S. C. 641 (*supra*). The jury returned no verdict on the substantive charge of burglary contained in count 1, and found, as to the substantive receiving charge in count 3, that the value of the property was less than $100. Petitioner argues that, in view of the absence of verdict on the substantive burglary count, his conviction on the conspiracy count could have been only for conspiracy to commit the misdemeanor of receiving property of less than $100, with the result that the maximum punishment which could be imposed under 18 U. S. C. 371 would be one year for conspiracy to commit a misdemeanor.

The jury could have concluded, quite logically, that, while petitioner conspired with Thompson to have Thompson commit burglary to get the transcript, petitioner did not participate in the actual burglary, at which he was not present, to the degree that would make him an aider and abettor of the substantive crime. Cf. *Nye & Nissen* v. *United States*, 336 U. S. 613, 619–620. Thompson's testimony that petitioner asked him if he had gloves and told him not to forget to wear them (4 R. 126) in itself would show that the conspiracy contemplated the burglary.

The offense under the substantive aider and abettor count (count 1) and the conspiracy count are separate and distinct, and are punishable by separate sentences. *Pinkerton* v. *United States*, 328 U. S. 640; 643–644; *United States* v. *Crowe*, 188 F. 2d 209 (C. A. 7); *Colosacco* v. *United States*, 196 F. 2d 165, 168;

DARK PAGE

229 F. 2d 880 (C. A. 10). And in any event consistency in the jury's verdict is not required. Since the conspiracy on which petitioner was convicted was to commit a felony as well as a misdemeanor, the three year sentence was permissible.

6. Petitioner also challenges (Pet. 58–60) the constitutionality of 18 U. S. C. 13, insofar as it is involved in the conspiracy count, on the grounds that it unlawfully delegates federal legislative powers to the states, that it encroaches upon powers reserved to the states, and that it is too indefinite and vague. But all that 18 U. S. C. 13 does is to make applicable, by adoption and incorporation, state criminal laws which govern in the states in which federal enclaves are located. It has been consistently held that Congress, by such specific reference and adoption, may validly incorporate state laws into federal penal statutes. *Hemans* v. *United States,* 163 F. 2d 228 (C. A. 6), certiorari denied, 332 U. S. 801; *Hollister* v. *United States,* 145 Fed. 773, 778–779 (C. A. 8) (similar statute involved). And see *Franklin* v. *United States,* 216 U. S. 559, holding that a similar claim of unconstitutional delegation of legislative powers was so insubstantial as not to warrant exercise of the Court's appellate jurisdiction.[12]

[12] Since the California statute was in existence before the 1948 revision of the federal criminal laws (see note 2 of opinion below), the aspect of 18 U. S. C. 13 which adopts subsequently enacted state laws is not involved.

LEEDTHRU

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

OSCAR H. DAVIS,
Acting Solicitor General.
WARREN OLNEY III,
Asistant Attorney General.
BEATRICE ROSENBERG,
FELICIA DUBROVSKY,
Attorneys.

AUGUST 1956.

DARK PAGE

APPENDIX

The pertinent portions of the statutes and rule involved are as follows:

18 U. S. C. 1:

Notwithstanding any Act of Congress to the contrary:

(1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.

* * * * *

18 U. S. C. 7:

The term "special maritime and territorial jurisdiction of the United States", as used in this title, includes:

* * * * *

(3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

* * * * *

18 U. S. C. 13 (Assimilative Crimes Statute):

Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

LEEDTHRU

18 U. S. C. 371:

If two or more persons conspire either to commit any offense against the United States or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such disdemeanor.

18 U. S. C. 641:

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Deering's California Penal Code

Sec. 459:

Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, railroad car, trailer coach as defined by the Vehicle Code when the doors of such vehicle are locked, aircraft as defined by the Harbors and Navigation Code, mine or any

DARK PAGE B

underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary.

* * * * *

Sec. 460:

Every burglary of an inhabited dwelling-house or building committed in the night-time, and every burglary, whether in the daytime or night-time, commited by a person armed with a deadly weapon, or who while in the commission of such burglary arms himself with a deadly weapon, or who while in the commission of such burglary assaults any person, is burglary of the first degree.

Sec. 461:

Burglary is punishable as follows:

1. Burglary in the first degree: by imprisonment in the State prison for not less than five years.

* * * * *

Rule 33, Federal Rules of Criminal Procedure:

The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period.

U. S. GOVERNMENT PRINTING OFFICE: 1956

EEDTHRU

Office - Supreme Court
FILED
NOV 6 195
JOHN T. FEY, Cle

IN THE

Supreme Court of the United States

October Term, 1956

No. 243

GEORGE E. SHIBLEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Rehearing of Order Denying Petition for Writ of Certiorari.

MORRIS LAVINE.
215 West Seventh Street,
Los Angeles 14, California,
Attorney for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

LEEDTHRU

DARK PAGE BE

SUBJECT INDEX

PAGE

I.

The petitioner, a civilian lawyer whose prosecution in the case at bar arose out of his representation of an enlisted man in Marine Corps proceedings, stands convicted upon the unsupported testimony of an adjudicated insane man without (A) any proper predetermination by the trial court of the competency of the insane witness and (B) without proper instructions to the jury as to the weight and credibility to be given to the testimony, if competent, of an insane witness in a criminal trial 4

II.

Petitioner was placed in jeopardy, following a conversation between a juror and the wife of the Assistant United States Attorney after the trial commenced, by the discharge of a juror without petitioner's personal consent. This violated petitioner's rights under the Fifth Amendment to the United States Constitution 12

III.

The conduct and statements of the trial court and the giving of an instruction to the jury that it was its duty to agree, after it had been deliberating 24 hours tended to coerce the verdict of the jury and was an unconstitutional invasion of the right of trial by jury guaranteed by the Fifth and Sixth Amendments to the United States Constitution 15

IV.

The summation of the prosecutor was an appeal to passion and prejudice whose only purpose and effect was improperly to overcome the dispassionate judgment of the jury and influence the verdict 20

PAGE

V.

The offenses charged and of which petitioner was convicted, to-wit: "receiving" and "conspiracy" to steal, receive and convert a copy of a "transcript" does not encompass mere innocent receipt of an unstolen photographic print or negative of the allegedly stolen "copy of the transcript" taken by someone other than petitioner and under the possession and control of such other person 23

VI.

The evidence failed to establish that the "court of inquiry" was a lawfully constituted "court" of the United States, and that the "copy of the transcript" was, in fact, "the property of the United States," having value, rather than a worthless private report of a self-established group of trespassers 26

VII.

The court erroneously excluded evidence of the bad reputation for truth, honesty and integrity of the Government's witness, Thompson, an adjudicated insane man, and the sole witness upon whom the prosecution fundamentally relied and whose testimony the court below concedes was "the evidentiary basis of the jury's verdict" 33

Conclusion 36

DARK PAGE

TABLE OF AUTHORITIES CITED

CASES	PAGE
Allen v. United States, 164 U. S. 492	19
Ashcraft v. Tennessee, 322 U. S. 143	11
Austin v. United States, 208 F. 2d 420	22
Berger v. United States, 295 U. S. 78	7, 10, 21
Bollenbach v. United States, 326 U. S. 607	18
Boyd v. United States, 116 U. S. 616	37
Bram v. United States, 168 U. S. 532	11
Brown v. Mississippi, 297 U. S. 278	11
Burton v. United States, 196 U. S. 283	18, 19
Chambers v. Florida, 309 U. S. 227	11, 37
Chicago & E. I. Ry. Co. v. Sellers, 5 F. 2d 31	19
Christoffel v. United States, 338 U. S. 84	32
Corsen v. United States, 147 F. 2d 437	8
Crawford v. United States, 212 U. S. 183	36
Demetree v. United States, 207 F. 2d 892	19
District of Columbia v. Arms, 107 U. S. 519	7, 8, 11
Dynes v. Hoover (20 How.) 65 L. Ed. 838	26, 27, 28, 32
Edwards v. United States, 7 F. 2d 598	19
Fowlers v. United States, 329 U. S. 187	32
Francis v. Resweber, 329 U. S. 459	37
Gasquet v. Fenner, 235 Fed. 997	8
Glasser v. United States, 315 U. S. 60	13, 14
Gordon v. United States, 344 U. S. 414	10, 35
Henry v. United States, 204 F. 2d 817	19
Herbert v. Louisiana, 27 U. S. 312	37
Hoyt v. Adee, 3 Lans. (N. Y.) 173	8
Hutton, Ex parte, 44 Cal. 32	12
Irvine v. California, 347 U. S. 128	37
Jackson v. Superior Court, 10 Cal. 2d 350	12
Jones v. United States, 175 F. 2d 544	22

LEEDTHRU

PAGE

Lisenba v. California, 314 U. S. 219 37
Louisiana v. Reswebber, 91 L. Ed. 359 12
McClaughry v. Deming, 186 U. S. 49 27
McNabb v. United States, 318 U. S. 322 11
Michelson v. United States, 335 U. S. 469 34
Mooney v. Holohan, 294 U. S. 103 37
New York Central R.R. Co v. Johnson, 279 U. S. 310 22
Oliver, re, 33 U. S. 257, 92 L. Ed. 682 31
Paul, In re, 18 F. 2d 448 8
People v. Gage, 48 Cal. 323 12
People v. Webb, 38 Cal. 467 12
People v. Young, 100 Cal. App. 18 12
Peterson v. United States, 213 Fed. 920 19
Putnam v. United States, 213 Fed. 920 18
Quong Duck v. United States, 293 Fed. 563 18
Runkle v. United States, 122 U. S. 543 27
Samuel v. United States, 169 F. 2d 787 8
Screws v. United States, 325 U. S. 91 11
Shepard v. United States, 64 F. 2d 641 8
Silverthorne Lumber Co. v. United States, 251 U. S. 385 37
Simmons v. United States, 206 F. 2d 427 22
Snyder v. Massachusetts, 291 U. S. 97 ..... 36, 37
Stewart v. United States, 300 Fed. 769 19
United States v. American Die and Instrument Works, 213 F. 2d 731 22
United States v. Lefkowitz, 285 U. S. 452 37
United States v. Rumley, 345 U. S. 42 32
Viereck v. United States, 318 U. S. 236 ..... 7, 11, 22
Weeks v. United States, 232 U. S. 383 37
Wissel v. United States, 22 F. 2d 468 18

DARK PAGE B

STATUTES

	PAGE
Article of War 121	30
Article of War 135	30
Article of War 135(c)	31
California Code of Civil Procedure, Sec. 1880(1)	7
California Code of Civil Procedure, Sec. 2051	34, 35
Code of James II (Eng., 1682)	30
Federal Rules of Criminal Procedure, Rule 52(b)	22
Military Code, Art. 138	4, 29, 30
United States Code, Title 18, Sec. 641	23, 25
United States Code, Title 50, Sec. 731	30
United States Code, Title 50, Sec. 734	4, 29
United States Constitution, Art. III	27
United States Constitution, Fifth Amendment	2, 5, 36
United States Constitution, Sixth Amendment	2

TEXTBOOKS

Cooley's Constitutional Limitations, p. 405	12
70 Corpus Juris, Sec. 123, p. 94	8
Manual for Courts-Martial (1951), p. 14, para. 8	28
Naval Supplement to the Manual for Courts Martial, U. S. (1951), par. .0204, pp. 26-27	31
Naval Supplement to the Manual for Courts Martial, U. S. (1951), par. .0302, pp. 29-30	31
Naval Supplement to the Manual for Courts Martial, U. S. (1951), par. .0403, p. 71	31
8 Opinions Attorney General (1857), pp. 335, 347	31
Snedeker, Military Justice Under the Uniform Code, Sec. 501 (c), p. 77	27
5 Wigmore, Evidence (3rd Ed.), Sec. 1617, p. 491	35
5 Wigmore, Evidence (3rd Ed.), Sec. 1618, p. 491	35
Winthrop, Military Law and Precedents (1920), pp. 523, 528	32
Winthrop, Military Law and Precedents (2d Ed.), pp. 53, 54, 55	27
Winthrop, Military Law and Precedents (2d Ed.), pp. 926-936	30

IN THE

Supreme Court of the United States

October Term, 1956

No. 243

GEORGE E. SHIBLEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Rehearing of Order Denying Petition for Writ of Certiorari.

To: The Honorable Earl Warren, Chief Justice and the Honorable Associate Justices of the Supreme Court of the United States:

COMES NOW George E. Shibley, Petitioner, and moves this Honorable Court for a Rehearing in the above entitled matter and to grant a petition for writ of certiorari on the following grounds, to wit:

THE PETITIONER HAS OVERLOOKED PRESENTING IMPORTANT POINTS OF LAW WHICH ARE FUNDAMENTAL IN THE ADMINISTRATION OF CRIMINAL JUSTICE AND WHICH SHOULD BE FULLY PRESENTED AND URGED BEFORE THIS HONORABLE COURT BEFORE THE CAUSE BECOMES FINAL. THESE POINTS REQUIRE URGENT AND PLENARY CONSIDERATION BY THIS HONORABLE COURT, TO-WIT:

(1) The Petitioner, a civilian lawyer whose prosecution in the case at bar arose out of his representation of an enlisted man in Marine Corps proceedings, stands convicted upon the unsupported testimony of an adjudicated insane man without (a) any proper pre-determination by the trial court of the competency of the insane witness and (b) without proper instructions to the jury as to the weight and credibility to be given to the testimony, if competent, of an insane witness in a criminal trial.

(2) Petitioner was placed in jeopardy, following a conversation between a juror and the wife of the Assistant United States Attorney after the trial commenced, by the discharge of a juror without petitioner's personal consent. This violated Petitioner's rights under the Fifth Amendment to the United States Constitution.

(3) The conduct and statements of the trial court and the giving of an instruction to the jury that it was its duty to agree, after it had been deliberating 24 hours tended to coerce the verdict of the jury and was an unconstitutional invasion of the right of trial by jury guaranteed by the Fifth and Sixth Amendments to the United States Constitution.

(4) The summation of the prosecutor was an appeal to passion and prejudice whose only purpose and effect was improperly to overcome the dispassionate judgment of the jury and influence the verdict.

(5) The offenses charged and of which petitioner was convicted, to wit: "receiving" and "conspiracy" to steal, receive and convert a copy of a "transcript" does not encompass mere innocent receipt of an unstolen photographic print or negative of the allegedly stolen "copy of the transcript" taken by someone other than petitioner and under the possession and control of such other person.

(6) The evidence failed to establish that the "Court of Inquiry" was a lawfully constituted "court" of the United States, and that the "copy of the transcript" was, in fact, "the property of the United States", having value, rather than a worthless private report of a self-established group of trespassers.

(7) The court erroneously excluded evidence of the bad reputation for truth, honesty and integrity of the Government's witness, Thompson, an adjudicated insane man, and the *sole* witness upon whom the prosecution fundamentally relied and whose testimony the court below concedes was "the evidentiary basis of the jury's verdict".

I.

The Petitioner, a Civilian Lawyer Whose Prosecution in the Case at Bar Arose Out of His Representation of an Enlisted Man in Marine Corps Proceedings, Stands Convicted Upon the Unsupported Testimony of an Adjudicated Insane Man Without (A) Any Proper Predetermination by the Trial Court of the Competency of the Insane Witness and (B) Without Proper Instructions to the Jury as to the Weight and Credibility to Be Given to the Testimony, if Competent, of an Insane Witness in a Criminal Trial.

This case involved the alleged taking of a purported "copy" of a report or transcript of a proceeding of a "Court of Inquiry" at the El Toro Marine Air Base by one Charles Raymond Thompson, a Marine Reserve.

The petitioner, an outstanding lawyer, a graduate of Stanford University and of the Stanford Law School, and a member of the Bar of California for two decades, was retained to represent a Marine at El Toro, California facing charges of violation of certain military regulations. In the course of his successful efforts to acquit his client, Petitioner, as civilian counsel, made charges under Article 138 of the Military Code accusing the Commanding General and his subordinates at the Marine Base of committing wrongs against Petitioner's client. Although under the express provisions of Article 138 (50 U. S. C. 734) embodying almost three hundred years of established precedents, it was required that Petitioner's complaints be referred to an officer superior to the Commanding General, nevertheless the plain mandate of the Military Code was flouted and the accused general convened an illegal "court" of his own subordinates to investigate the charges against himself. The conviction herein was the culmination of

a long series of reprisals by military officials who would not brook such vigorous defense of an enlisted man by independent civilian counsel, such reprisals including the unprecedented arrest of petitioner in his law offices by armed Marines, his being taken by force to the military Base at El Toro, a harassing interrogation before the court of inquiry", illegally convened by the accused Commanding General, and a virtually unprecedented prosecution in the Federal Court for "contempt" of the alleged "court of inquiry."[1]

In the case at bar petitioner was convicted upon the testimony of Government witness Thompson, a Marine Reserve. Thompson, it developed during the trial, had been adjudicated insane, and said adjudication had never been set aside. The court below correctly concluded that the testimony of Thompson was the "sole support" of a considerable portion of the case for the prosecution, and the "evidentiary basis for the verdict of the jury."

Attorney Shibley was given a sentence of imprisonment of three years based upon the testimony of the insane witness. We contend that due process of law guaranteed by the Fifth Amendment to the Constitution forbids a conviction based on such testimony to stand. This court should, in its supervisory capacity over criminal cases, pass upon this most important question.

Thompson, when first interviewed by a representative of the Office of Naval Intelligence five months after the copy of the transcript was said to have been missed, denied

---

[1]Petitioner was acquitted by the jury but after the verdict the trial court sentenced petitioner to thirty days imprisonment in summary contempt proceedings. (See Shibley v. United States (C. A. 9, No. 14464, opinion unreported) and Shibley v. United States, S. Ct., October 1956 Term, No. 322.)

that he had anything to do with its taking [R. 194][2] and told the investigator, upon inquiry, that petitioner had nothing to do with it [R. 184]. Thompson was arrested on May 26, 1953 [R. 185], before the filing of the indictment and continued to deny his guilt until the opening day of the trial, December 8, 1953, when for the first time Thompson changed his plea [R. 3-5], pleading guilty to counts 1 and 4 of the indictment, after which counts 2 and 3 were dismissed. Imposition of sentence was postponed until conclusion of the trial, during which time he was allowed to remain free on his own recognizance [R. 5]. He became the principal Government witness whose testimony laid the main framework of the case according to the court below, and at the conclusion of the trial he received a suspended sentence [C. Tr. 119].[3] During all of these proceedings the government said nothing about his mental status, a history of which it undoubtedly had, if nothing else, as a part of his military record.

During the trial proceedings the defense developed evidence that Thompson had been adjudicated insane; had been confined in mental institutions on three different occasions; that the adjudication never had been set aside nor had there ever been any determination that Thompson's sanity was restored. The Government did not rebut this evidence and it stands in the record uncontradicted.

On the unfoldment of these facts, it then became the duty of the trial court to immediately examine into the competency of Thompson, for, both at common law and

---

[2]References designated "R" are to the Reporter's transcript of proceedings.

[3]References designated "C. Tr." are to the Clerk's transcript of record below.

under rules of evidence generally applicable and particularly under California law, a witness who is of unsound mind is an incompetent witness incapable of testifying. (Calif. Code Civ. Proc., Sec. 1880, subsec. 1.) The Government, by calling Thompson, necessarily vouched for him as a witness.

Government counsel did not call to the attention of either Court or opposing counsel that Thompson had been adjudicated insane. This it had a duty to do, since the attorney for the Government is attorney for all the people. (*Berger v. United States*, 295 U. S. 78; *Viereck v. United States*, 318 U. S. 236, 248.)

Although it has been held in one early case that mental illness does not necessarily disqualify the witness from testifying or being allowed to testify (*District of Columbia v. Arms*, 107 U. S. 519), the court there sets out the procedure which it is necessary to follow to establish competency of such testimony. Under the Arms view, where it appears that a witness is or has been insane, it becomes the duty of the court to first examine into the witness's ability to understand the oath and into his ability to give a correct account of the matters which he has seen or heard in reference to the questions at issue; such examination and whether or not the insane witness has the necessary understanding to raise him to the level of competency are matters which must be passed upon by the court, which has the affirmative duty of pre-determining the insane witness's competency. As the court stated therein (2 S. Ct. at p. 842):

> "It is undoubtedly true that a lunatic or insane person may, from the condition of his mind, not be a competent witness. *His incompetency on that*

> *ground,* like incompetency for any other cause, ***must be passed upon by the court,*** and to aid its judgment evidence of his condition is admissible. . . . The general rule, therefore, is that a lunatic or a person affected with insanity is admissible as a witness if he have sufficient understanding to apprehend the obligation of an oath, and to be capable of giving a correct account of the matters which he has seen or heard in reference to the questions at issue; and ***whether he have that understanding is a question to be determined by the court, upon examination of the party himself, and any competent witnesses who can speak to the nature and extent of his insanity.*** Such was the decision of the court of criminal appeal in England, in the case of Reg. v. Hill, 5 Cox, Crim. Cas. 259." (Our emphasis).

It has been said in another early case that inquisition of lunacy found against one is *prima facie* evidence of his incompetency as a witness, and unless it be overcome by evidence of his sanity he should not be permitted to testify, even as against one not a party to the proceedings in lunacy. (*Hoyt v. Adee,* 3 Lans. (N. Y.) 173; Vol. 70, Corpus Juris, Witnesses, Sec. 123, p. 94.

Even then, if the court should determine that the witness does understand the meaning and sanctity of the oath and that he has ability to recollect and narrate events, the weight and credibility of the witness thereafter becomes a question of fact for the jury under careful and proper instructions to the jury. (*District of Columbia v. Arms, supra; Corsen v. United States,* 147 F. 2d 437; *Samuel v. United States,* 169 F. 2d 787, 792; *In re Paul,* 18 F. 2d 448; *Gasquet v. Fenner,* 235 Fed. 997; *Shepard v. United States,* 64 F. 2d 641.) In the case at bar neither

requirement was satisfied: the trial court failed to examine into or determine the competency of the adjudicated insane witness and the court failed to give any proper instructions to the jury from which it could determine the weight and credibility to be accorded the testimony of an insane person.

After the evidence developed that Thompson had been adjudicated insane and had been in mental institutions,[4] the court did not in any way stop the proceedings to examine into Thompson's competence as a witness in accordance with the requirements set forth in the Arms decision. The trial judge allowed this insane witness to go on and testify as though his views were gospel truth and trifles light as air became as solemn and weighty as the Holy Writ. The trial judge at the conclusion failed to give any instructions to the jury on the weight and credibility to be given the testimony of the insane witness.

The Solicitor General, in opposition to the Writ of Certiorari, stated: "The credibility of witnesses was a matter for the jury to determine under appropriate instructions. *Such instructions were given.* [7 R. 471-72, 475, 477]." (Our emphasis). Despite such representation by Government counsel, no instructions whatsoever were given to the jury on the weight and credibility to

---

[4]Thompson was confined in a private sanitarium for the mentally afflicted and sick in New Orleans in 1949 [R. 168], where he received electric shock therapy [R. 169]. In the same year, he was also confined in the Gulfport Hospital in Mississippi, a veterans' hospital, for a mental affliction [R. 169]. On April 28, 1950, he was confined in the State Institution in Central Louisiana at Pineville, Louisiana, by an order issued out of the 15th Judicial Court of Louisiana, for the Parish of Vermillion in the town of Abbeville [R. 167]. As of the time he testified, the order of commitment had not been set aside [R. 168].

be given the testimony of an adjudicated insane witness who had been confined three times in mental institutions, and the jury was left without "rudder or oar" to determine its most important issue; namely, whether the conviction of a leading and reputable attorney could be based upon the sole testimony of an adjudicated insane witness, whose adjudication of insanity had never been set aside.

There is the presumption that a condition once determined to exist continues to exist until set aside. While it is a rebuttable presumption, there was no evidence to rebut this presumption in this case. Once insanity was shown to exist in the witness, the burden of proof as to his competency shifted to the Government. In this case the Government did not assume the burden, and never proved his competency.

The conviction, the judgment of imprisonment of three years, and the termination of an outstanding legal career of two decades, in this case therefore rests upon the testimony of this adjudicated insane man. Remove it from the case and there is absolutely nothing with which to sustain the conviction and its resulting tragedy.

As was stated by this Court recently in *Gordon v. United States*, 344 U. S. 414, 417: "Where, as here, the Government's case may stand or fall on the jury's belief or disbelief of one witness, his credibility is subject to close scrutiny." If counsel for the Government is counsel for all the people (*Berger v. United States, supra*) it was the duty of Government counsel to disclose the mental condition of its principal witness. Since he was in the Marine Corps and then in the Reserves, his record must have been fully before them, including the history of his adjudicated insanity. It was the duty of the trial court thereafter to make an examination, first of all,

into Thompson's competency. (*District of Columbia v. Arms, supra.*) This was a question which required the same determination as in a "third degree" case where the court is under a manifest duty in the first instance to examine the evidence to see if a confession is free and voluntary. (*Ashcraft v. Tennessee,* 322 U. S. 143; *Chambers v. Florida,* 309 U. S. 227; *Brown v. Mississippi,* 297 U. S. 278; *Bram v. United States,* 168 U. S. 532, 541; *McNabb v. United States,* 318 U. S. 322.) Until the court has performed this function, the testimony of the witness is improperly received.

This Court should pass upon this very important issue in its supervisory capacity over criminal procedure. Although in the case of *District of Columbia v. Arms, supra,* the procedure to be followed is set out, that case did not fully raise the question of great importance raised in the case at bar in its present setting where the procedure was not followed. In the *Arms* case the court there did point out the necessity of the court's determining the competency of the witness in the first instance and then appropriately instructing the jury as to the credibility of *such a witness,* if the witness is allowed to testify. Here there was no instruction as to the credibility to be given or lack of credibility to be given to a witness who has once been adjudicated insane. It was the duty of the court to do so, and this Court should grant certiorari to say so. (*Screws v. United States,* 325 U. S. 91, 107; *Viereck v. United States,* 318 U. S. 236, 247, 248.)

The question raised here was not appropriately or fully presented in our original petition and is one of such great and fundamental importance as to require the plenary consideration of this Court and the granting of the Writ.

II.

Petitioner Was Placed in Jeopardy, Following a Conversation Between a Juror and the Wife of the Assistant United States Attorney After the Trial Commenced, by the Discharge of a Juror Without Petitioner's Personal Consent. This Violated Petitioner's Rights Under the Fifth Amendment to the United States Constitution.

The record of the proceedings for the morning of Wednesday, December 9, 1953, in the trial court shows that on the previous afternoon a juror talked to the wife of the Assistant United States Attorney prosecuting the case [R. 151, 152, 153]. The exact circumstances of the incident do not fully appear in the record and the offer of another juror, who appears to have been a witness to the discussion between the wife of the prosecutor and the first juror, to disclose the circumstances was rejected by the court [R. 153].

The trial court discharged the first juror and substituted an alternate. Counsel for petitioner agreed but not petitioner personally. Substitution was made without petitioner's consent and, in fact, without asking him whether or not he consented to the discharge and substitution [R. 151, 152].

Jeopardy had thereupon attached. (*People v. Young*, 100 Cal. App. 18; *Jackson v. Superior Court*, 10 Cal. 2d 350; *Louisiana v. Resweber*, 91 L. Ed. 359; *Cooley's Constitutional Limitations* (4th Ed.) 405; *People v. Webb*, 38 Cal. 467; *People v. Cage*, 48 Cal. 323; *Ex parte Hutton*, 44 Cal. 32.)

In *People v. Young, supra*, 279 Pac. 824, when the jury was completed and regularly empaneled and sworn,

the court held that the defendant was placed in jeopardy by a subsequent allowance of a peremptory challenge by the prosecution resulting in the excusing of one juror and the substitution of another juror.

Individual constitutional rights of an accused cannot be waived by the attorney, but must be waived by the defendant personally. Here there was no personal waiver. No one asked petitioner whether he consented to the discharge and substitution or whether he waived the constitutional right involved. The fact that petitioner was an attorney, which the Court of Appeals mentioned in its opinion, did not change his constitutional rights, and did not alter the requirement. (*Glasser v. United States,* 315 U. S. 60, 69, 70.)

In the *Glasser* case this Court stated:

> "To preserve the protection of the Bill of Rights for hard-pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights. . . . The fact that Glasser is an attorney is, of course, immaterial to a consideration of his right to the protection of the Sixth Amendment. His professional experience may be a factor in determining whether he actually waived his right to the assistance of counsel . . . but it is by no means conclusive."

In many respects the position of petitioner in the case at bar is stronger than that of *Glasser.* In *Glasser,* the attorney-defendant appeared as his own counsel in association with another attorney, and defendant Glasser actually participated in a discussion before the court with reference to the matter there involved, representation by counsel.

In the case at bar petitioner did not appear as his own counsel, did not participate in the proceedings other than as a witness, was not consulted by the court with reference to the discharge of the juror and substitution of another. In fact, no reference to or concern for petitioner's wishes or feelings in the matter was shown by the trial court. Moreover, in *Glasser* the proceedings were before the court alone; in the instant case the discharge and substitution of the juror was in the presence of the entire jury; the perils, fears and embarrassment of a defendant, represented by counsel, abruptly and without invitation by the court, speaking out in the presence of the jury on a matter involving members of the jury themselves, cannot be minimized even where the defendant is himself an experienced attorney.

Under a less aggravated factual situation, this Court in the *Glasser* decision stated:

> "Under these circumstances to hold that Glasser freely, albeit tacitly, acquiesced in the appointment of Stewart is to do violence to reality and to condone a dangerous laxity on the part of the trial court in the discharge of its duty to preserve the fundamental rights of an accused."

Silence of a defendant on a constitutional subject does not constitute a waiver of his constitutional rights. Here there was no express waiver and jeopardy attached. The presence or absence of prejudice cannot be determined as a matter of law. The presumption is that the denial of a fundamental constitutional right is, in itself, prejudicial. (*Glasser v. United States,* 315 U. S. at pp. 75, 76.)

III.

The Conduct and Statements of the Trial Court and the Giving of an Instruction to the Jury That It Was Its Duty to Agree, After It Had Been Deliberating 24 Hours Tended to Coerce the Verdict of the Jury and Was an Unconstitutional Invasion of the Right of Trial by Jury Guaranteed by the Fifth and Sixth Amendments to the United States Constitution.

The jury in the case at bar retired at 11:36 A. M. on Friday, December 11, 1953. At 3:20 P. M. on the same day the jury returned to the courtroom [R. 509] and the foreman stated the jury desired to have the testimony of Cpl. Huckenphaler reread [R. 509]. This was done [R. 509-61]. The jury again retired at 4:13 p. m. on Friday [R. 561].

The jury returned to the courtroom at 11:00 a. m. the next day, Saturday, December 12 [R. 561]. They wished some explanation of the instructions [R. 561].

> "The Foreman: On Count Four concerning conspiracy. We would like to have the instruction repeated. We understand it was not read. Your Honor said it was too lengthy to read or something like that [See, R. 483].
>
> The Court: I will give you the instruction I read to you yesterday on conspiracy. Is that what you want?
>
> The Foreman: I think so." [R. 561-2.]

The court reread a portion of the instructions previously given [R. 562-67]. The court then inquired if the jury thought that the instruction which he had just given would help; he stated: "I realize that you have been out nearly twenty-four hours"; and then stated: "I want

to give you one additional instruction that may help you" [R. 567]. The court then stressed that the trial had been long and expensive; if the jury failed to agree another expensive trial would be entailed; the court didn't want any juror to surrender his conviction, but the questions should be considered with a proper regard and deference to the opinions of each other; if the larger number are for conviction, a dissenting juror should consider under the circumstances whether his own doubt is a reasonable one, and *vice versa* [R. 568-70]. The court indicated that he was trying "to follow the language of the United States Court in Allen v. United States" [R. 571]. An exception was noted to the instruction [R. 571]. The court agreed that he didn't want anybody to surrender their honest convictions. The court then immediately added:

> "I might say that I will be here until noon and after that I am going to return home. And I think also counsel will want to be on their way. They can assemble again in about an hour or so on notice anytime between now and tomorrow evening." [R. 572.]

Counsel for petitioner stated that all of his time was available to his client [R. 572]. The court stated:

> "Well, we are all in the same boat, gentlemen, counsel on both sides and the court. *We are at the mercy of the jury*" [Emphasis ours; R. 572].

The jury retired at 11:05 a. m., and in one-half hour were back with their verdict [R. 572].

As previously indicated, the case against petitioner was more than doubtful. The jury had been deliberating for twenty-four hours. They returned to court on Saturday morning, really to ask for an explanation of the charge

in the indictment which the trial court had not fully made clear, but instead were given a portion of the court's charge on the abstract law of conspiracy. Having received the instruction, it might be expected that they would be permitted to retire to resume their deliberations, the jury not having indicated that they did not feel they could reach an agreement. Instead, they were given an instruction whose tendency to coerce a verdict has been noted by the courts which should now be passed upon by this court in its supervisory capacity over criminal justice. The jury were told that if they did not agree within the hour, the court and counsel would be gone and the jury might be compelled to stay together over the week-end. They were told that it might be possible to get court and all counsel together on an hour's notice, but any reasonable person could conclude that such hope might not be fulfilled over the week-end. When the trial court took it upon himself to say that "counsel will want to be on their way" and the attorney for petitioner tried to stem the tide by asserting that all of his time was available to his client, the court then pointed out in effect that counsel and the court, so far as the week-end was concerned, were "at the mercy of the jury." It is difficult to escape the conclusion that the jury, which had just come out to obtain further instructions on the conspiracy count, could not help being convinced from all that occurred that the trial court desired their deliberations to come to an immediate conclusion; that if they did not, they might find themselves detained over the week-end, and the more they deliberated, the less merciful were they being to court and counsel. This conclusion seems warranted because the jury after having deliberated for twenty-four hours, took no more time than it takes to write their verdict.

We ask this Court to re-examine the so-called Allen Instruction in the light of its own subsequent instruction in *Bollenbach v. United States,* 326 U. S. 607, wherein this Court has pointed out that where a jury has been deliberating for some time and has frayed nerves, the giving of an instruction at such crucial time improperly sways it.

The Allen Instruction unconstitutionally invades the province of the jury to deliberate and reach a verdict unhampered by any remarks such as those contained in this instruction. There is *no duty* on the part of the jury to agree, but only to reach an independent conscientious view of the evidence. There is *no duty* on the part of a jury to reach a final disposition of the case. If the asking of a jury is to how it stands numerically violates the defendant's right to trial by jury, how much more does this instruction violate the defendant's constitutional rights? (*Burton v. United States,* 196 U. S. 283, 304, 308.)

The impropriety of giving this type of an instruction in the setting of this case is easily manifest. It is coercive, it compel's minority jurors to surrender their individual views. (*Putnam v. United States,* 213 Fed. 920, 926; *Quong Duck v. United States,* 293 Fed. 563; *Burton v. United States, supra.*)

As pointed out by the court in *Wissel v. United States,* 22 F. 2d 468, 471 (C. A. 2, 1927):

> "The cases all recognize that the surrender of the independent judgment of a jury may not be had by command or coercion. It is not enough to cure the error to conventionally say that it is the function of the jury to decide questions of fact. Pressure of

> whatever character, whether acting on the fears or hopes of the jury, if so exerted as to overbear their volition without convincing their judgment, is a species of restraint under which no valid judgment can be made to support a conviction."

While a paraphrase of the instruction which was recited in *Allen v. United States,* 164 U. S. 492, 501, has on occasion been upheld, it has been constantly recognized that the instruction is by its nature coercive and if other circumstances are combined with such coercive charge as to influence the verdict of the jury, the action of the trial court may not stand. As this Court stated in *Burton v. United States,* 196 U. S. 283, 307, where in addition to the Allen charge the trial court had also asked the jury how they stood numerically: "A slight thing may have turned the balance against the accused under the circumstances shown by the record." A similar result was reached under different circumstances in *Stewart v. United States,* 300 Fed. 769, 782 (C. A. 8, 1924). (See also, *Chicago & E. I. Ry. Co. v. Sellers,* 5 F. 2d 31 (C. A. 8, 1925); *Edwards v. United States,* 7 F. 2d 598, 602 (C. A. 8, 1925).) The court below had occasion to consider the same problem in *Peterson v. United States,* 213 Fed. 920 (C. A. 9, 1914). In reversing the judgment of conviction, the court held that the instructions which paraphrased *Allen* were coercive under the circumstances. "Can there be any question that, retiring with the impression that the all-important thing was a final disposition of the case, the jurors consciously or unconsciously bartered the acquittal of one defendant for the conviction of the other" (at p. 926). (See also, *Demetree v. United States,* 207 F. 2d 892 (C. A. 5, 1953) and *Henry v. United States,* 204 F. 2d 817 (C. A. 6, 1953).)

IV.

The Summation of the Prosecutor Was an Appeal to Passion and Prejudice Whose Only Purpose and Effect Was Improperly to Overcome the Dispassionate Judgment of the Jury and Influence the Verdict.

Counsel for the Government concluded his opening summation to the jury with the following statement:

> "Ladies and gentlemen, this isn't a simple burglary case. This is a case of taking documents from the United States Government. It is your Government and mine. *This could very well have been an atom secret* or anything else. It is Government property. *And it is a threat to our security if we let it go unpunished.*" [R. 413.] (Our emphasis.)

Government counsel was certainly as familiar with the case and the record he made as anyone at the trial. He had produced military officials including Corporal Huckenphaler as witnesses at the trial. All were familiar with the transcript of the "Court of Inquiry." Some had been present throughout the hearing. There was not the slightest intimation that the transcript, or its contents, were "secret," "classified," "confidential" or "restricted." The record was clear that the "Court of Inquiry" was purportedly examining into charges of personal derelictions by military officers with respect to petitioner's client, Sergeant Bennette, involving Bennette's alleged transportation of Marines to and from the base for pay, and trying to compel petitioner to reveal the details of his charges against the Commanding General. There were no *"atom secrets"* involved, and none could be. There was no claim that petitioner was engaged in the business generally

of stealing transcripts. There was one specific document involved in the charge in the indictment and at the trial, a seventh or eighth carbon copy of a transcript could reflect no more than dispute between the officers and petitioner as to their respective legal rights to obtain or withhold information about personal charges made by petitioner. Nothing in the evidence or the record justified such comments by the prosecutor as *"this could very well have been an atom secret or anything else"* and *"it is a threat to our security if we let it go unpunished."* In the light of the well known public feeling and dread concerning the purloining of *"atom secrets,"* such remarks by the prosecutor here could only have been calculated to incite passion and prejudice against this petitioner and to overcome independent judgment with respect to the insubstantiality of the case against petitioner.

While a prosecutor

> "may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (*Berger v. United States,* 295 U. S. 78, 88.)

> "The state, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence. The public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict uninfluenced by the appeals of

counsel to passion or prejudice." (*N. Y. Central R. R. Co. v. Johnson*, 279 U. S. 310, 318.)

See also:

Viereck v. United States, 318 U. S. 236, 247;

United States v. American Die and Instrument Works, 213 F. 2d 731 (C. A. 3, 1954).

Appellate courts will exercise their authority under Rule 52(b) of the Federal Rules of Criminal Procedure where error has affected the substantial rights of an appellant. (*Jones v. United States*, 175 F. 2d 544 (C. A. 9, 1949); *Austin v. United States*, 208 F. 2d 420, 421 (C. A. 5, 1953); *Simmons v. United States*, 206 F. 2d 427, 429 (C. A., D. C., 1953).) As this Court indicated in *Viereck v. United States, supra* (p. 248):

> "At a time when passion and prejudice are heightened by emotions stirred by our participation in a great war, we do not doubt that these remarks addressed to the jury were highly prejudicial, and that they were offensive to the dignity and good order with which all proceedings in court should be conducted. *We think that the trial judge should have stopped counsel's discourse without waiting for an objection.*" (Our emphasis.)

V.

The Offenses Charged and of Which Petitioner Was Convicted, to-wit: "Receiving" and "Conspiracy" to Steal, Receive and Convert a Copy of a "Transcript" Does Not Encompass Mere Innocent Receipt of an Unstolen Photographic Print or Negative of the Allegedly Stolen "Copy of the Transcript" Taken by Someone Other Than Petitioner and Under the Possession and Control of Such Other Person.

The court below has overlooked the important issue as to whether the admittedly *unstolen* photographic negatives, if received by petitioner, constituted "receiving, concealing or retaining" government property with intent to convert, within the meaning of Title 18, Section 641. The uncontradicted evidence in this case is that petitioner did not "receive" the allegedly stolen seventh or eighth carbon copy of the transcript of the "Court of Inquiry"; this "copy of the transcript", if it was a "copy", was mailed on to Drew Pearson by prosecution witness Thompson and his roommate Pat Fields, a perennial legman for news columnist Drew Pearson [R. 230-234]. The enterprise of such a newsgetter is well known to the Court, and the zealousness with which it is sought to obtain information not otherwise available is a matter of common knowledge. Likewise in the realm of common knowledge is the intermittent battle carried on in his column by Pearson against the Marine "Brass" during 1952.

The uncontradicted evidence in this case is that Thompson and Pearson's legman, Pat Fields, mailed to petitioner and to his attorney what appeared to be Christmas pack-

age, the package addressed to petitioner containing *unstolen* photographic negatives and the package to petitioner's attorney containing *unstolen* photographic prints of the seventh or eighth alleged carbon copy of the transcript [R. 231-33]. It is uncontradicted that both packages were sent by registered mail, return receipt requested, thus requiring petitioner and his attorney to give indelible written evidence of their connection, however remote, with the alleged stolen "copy" of the transcript [R. 230-34].[5] However, the fact remains that the article "received" through the mail by petitioner was not a "stolen" copy, or "property of the United States". The uncontradicted evidence of the Government is that this package contained *unstolen* photographic negatives made by a photo shop and paid for by prosecution witness Thompson [R. 396-99]. The allegedly stolen carbon copy was not "received" by petitioner at any time but addressed and mailed to Drew Pearson by Pearson's legman, Pat Fields, in cooperation with witness Thompson.

One who receives an *"unstolen"* photograph of a stolen article cannot be said to be a "receiver" of the stolen

---

[5]This could well have been done by Thompson and Fields to establish an explanation and alibi in advance, since broadcasting or printing material from the "transcript" might cause inquiry. It is incomprehensible that the "receiver" would part with the "copy". Had Shibley "received" and kept the "copy" and had the photographs been sent on to Pearson the situation would have been different. But the uncontroverted testimony is that Thompson and Pearson's legman, Fields, sent on the "copy" which forms the basis of the charges, to Drew Pearson. Neither the actual "copy" itself or Pearson were ever produced in court.

article. To so hold would be to say that one who is handed a photograph of a stolen Cadillac has by that fact become a "receiver" of a stolen Cadillac. Nor does the scope of the offense of "receiving" become larger in the case of documents. Congress may make it an offense to receive an *unstolen* photograph of a document but, to date, it has not done so.

Does the word "receiving" as contained in Title 18, Section 641 encompass the act of "not receiving" the stolen thing, but only "receiving" an *unstolen* photographic copy of the thing allegedly stolen? The very question answers itself in the negative. Congress has never had any trouble expressing itself in words. If mere receipt of an unstolen photostat or photograph of a document is to be made a violation of the law, Congress could and should say so and not the judiciary. "Receiving, concealing or retaining" does not mean its very antithesis, that is to say, *"not receiving, not concealing and not retaining"* a document which is mailed on by a columnist's legman to his perennial employer, a newspaper man by whom the document, however worthless, is assumedly received, concealed and retained. The question posed herein should be decided by this Honorable Court.

VI.

The Evidence Failed to Establish That the "Court of Inquiry" Was a Lawfully Constituted "Court" of the United States, and That the "Copy of the Transcript" Was, in Fact, "the Property of the United States", Having Value, Rather Than a Worthless Private Report of a Self-established Group of Trespassers.

In the case at bar, there was an absolute failure to prove that the "copy of a transcript", if one existed, was that of a lawfully constituted "court" of the United States, rather than a valueless private report of an illegal group of Trespassers.

More than this, the only evidence in the record touching upon the legality of the alleged "court of inquiry" [C. Tr. 19-24] affirmatively shows that the alleged "court" was unlawfully constituted, and convened in total disregard of the law, and was a void self-established group of trespassers. The same evidence compels the conclusion that the "copy of the transcript" was not that of a lawful "court" of the United States and thus the "property of the United States" having *some* value, but rather a valueless private report of an unlawful band of trespassers.

As early as 1847 this Court held in the case of *Dynes v. Hoover*, 20 How. 65, L. Ed. 838, that when the law for convening military courts and directing their proceedings for organization have been disregarded, *that everything which may be done is void, and that in such a case "the court and the officers are all trespassers":*

> *"In such cases, everything which may be done is void —not voidable, but void;* and civil courts have never failed, upon a proper suit, to give a party redress, who has been injured by a void process or void judg-

> ment. In England, it has been done by the civil courts, ever since the passage of the Mutiny Act of William and Mary, ch. 5, 3d April, 1689. And it must have been with a direct reference to what the law was in England that this court said, in *Wise v. Withers*, 3 Cr. 337, that in such a case 'the court and the officers are all trespassers.'" (Our emphasis.)

The correctness of the position taken in the *Dynes* case has, of course, never been seriously doubted.

There is, of course, no presumption that a military "court" is a lawful court having legal "existence" or jurisdiction and before its judgments may be recognized *it must appear affirmatively and unequivocally that it was constituted according to law, that it had jurisdiction, that it complied with all of the statutory regulations governing it and that its order or sentence conformed to the law.* (*Runkle v. United States*, 122 U. S. 543, 555; *McClaughry v. Deming*, 186 U. S. 49; *Dynes v. Hoover, supra.*)

The above legal principles flow, among other things, from the fact that military courts *are not courts established under the Judiciary Article*, Article III of the Constitution, (Snedeker, *Military Justice Under the Uniform Code*, Sec. 501 (c) p. 77; Winthrop, *Military Law and Precedents*, 2d Ed., p. 53); *they are impermanent, temporary, summary tribunals;* (Snedeker, *supra*, p. 77; Winthrop, *supra*, p. 54); *a military tribunal is not "a court of record, has no fixed place of session, no permanent office or clerk, etc.,"* (Winthrop, *supra*, pp. 54, 55); *it has no inherent or implied powers and its "judgments" or "orders" are simply recommendations.* (Winthrop, *supra* p. 55.)

Under the concept of the "requisites of a military court" approved by this Court in *Dynes v. Hoover, supra,* and

incorporated in the *Manual for Courts-Martial, 1951,* Para. 8, p. 14, "lack of jurisdiction" of a military court means either that *no lawful court ever actually existed, or, if it was lawfully conceived that by reason of certain fatal defects, its very existence was destroyed ab initio.*

It is in connection with this concept of "non-existence" that this Court in *Dynes v. Hoover* stated: ". . . *in such cases everything which may be done is void . . . not voidable, but void; and . . . in such a case 'the court and its officers are all trespassers'.*" (Our emphasis.)

In the case at bar the Government utterly failed to establish the "lawful and legal existence" of the alleged "court of inquiry", that the "court" was a "Court of the United States" rather than an unlawful band of interlopers and that a copy of a "transcript" allegedly prepared by it was thus the "property of the United States" rather than that of a group of trespassers; further the only "value" which a "copy of a transcript" could have failed of proof when the Government failed to prove it a copy of a transcript of a lawful court.

The only evidence in the record as to the character of the alleged "court" consists in the factual and circumstantial allegations in the sworn affidavit of petitioner in support of his motion for disclosure of grand jury minutes [C. Tr. 19-24]. *None of these sworn allegations were ever factually or circumstantially denied by the Government, and none were ever denied under oath; to this day they stand uncontroverted in the record.*

These facts show that petitioner, during the course of a pre-trial investigation of his client Master Sergeant John R. Bennette, wrote to the Commandant of the Marine Corps complaining of "wrongs being inflicted on Bennette by the Commanding General and his subordinates at El Toro," demanding "redress of said wrongs under the provisions of Article 138, Uniform Code of Military Justice", and demanding "prosecution of said Commanding General and his subordinates for violation of the Uniform Code of Military Justice."

Thereafter, the accused Commanding General purported to convene a military "court of inquiry" made up of his own subordinates to investigate the charges made against him and his command by petitioner. This he was without lawful power to do.

Article 138 of the Uniform Code (*50 U. S. C. 734*) provides, in part, as follows:

> "Any member of the armed forces who believes himself wronged by his commanding officer, . . . may complain *to any superior officer who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made.* . . ."

In the instant case the complainant, under Article 138, was petitioner's client; the principal "commanding officer" against whom the complaint was made was the Commanding General at El Toro; the "superior officer" of the Commanding General to whom the complaint was made was the Commandant of the Marine Corps; it thus became the duty of the Commandant to forward the complaint to the

"officer exercising general court-martial jurisdiction over" the Commanding General. Obviously, the Commanding General could not exercise general court-martial jurisdiction over himself and had no power to convene a lawful "court", examining into the complaints against himself.

Article 138 is based on the former Article of War 121 and ultimately upon two articles, one applying to "officers" and the other to "soldiers", which first appeared in the Code of James II in 1682.

The present article is not limited, as were its antecedents, to complaints against superior officers within the regimental chain of command. The two articles, as they then existed are discussed by Winthrop (*supra*, pp. 926-36), and while remarking that "a resort to either as a remedial statute is most unfrequent in practice." Winthrop, *supra*, p. 936 points out that Article 30 of his day, "entitled indeed a soldier, 'who thinks himself wronged by any officer', to a hearing before a court of his regiment, and, if he is not satisfied with the result, to an appeal to a higher court . . ."

Even in the absence of the specific provisions of Article 138, the accused Commanding General would have been powerless to convene a lawful court in the circumstances under the general "court of inquiry" provision, Article 135 (*50 U. S. C. 731*), not only because of the inherent lack of general court-martial jurisdiction over himself (the test of jurisdiction to convene a court of inquiry in the absence of specific designation by the Secretary of a Department being the general court-martial jurisdiction

of the commander) and the requirement contained in Article 135(c) that any person whose conduct is subject to inquiry shall be designated as a party, but because of the many inhibitions placed upon the authority to convene inquiries or investigations contained in the Naval Supplement to the Manual for Courts Martial, U. S., 1951. See, for example, paragraph .0204 (pp. 26, 27) wherein it is provided as follows:

> *"In those situations where the commander concerned may be responsible for the incident or circumstances which necessitates the inquiry, the investigation should be ordered by a superior in command in the interest of obtaining an objective investigation and a determination and reporting of the unbiased facts. Under such circumstances, the officer or officers, comprising the fact-finding body should not be subordinates of the commander concerned."*

See also, Paragraph .0302 (pp. 29-30) and Paragraph .0403 (p. 71) which impose restrictions where *"any such officer can be designated a party by reason of his direct interest in the subject of inquiry"* or where *"an incident requiring investigation may reflect adversely upon the commander."*

The same principles have governed this Court in condemning and refusing recognition to a system wherein one man, in effect, acted as judge, jury and executioner. (*Re Oliver,* 33 U. S. 257, 92 L. Ed. 682.)

While similarities in their functions have been suggested (1857, 8 *Op. Atty. Gen.* 335, 347), courts of inquiry are not secret bodies to be analogized to grand juries.

(Winthrop, *Military Law and Precedents* (1920), pp. 523, 528.) A court of inquiry does not possess "inherent powers" or "common law powers" as may be said in some jurisdictions with respect to a grand jury but, where improperly convened by one having no authority to convene it, or, where improperly constituted, it, like the "grand jury" under similar circumstances, is a void body having no power or function. (*Fowlers v. United States,* 329 U. S. 187.) This Court has reached the same conclusion with respect to an alleged "congressional committee" where it has been illegally constituted or where no quorum has been present. (*Christoffel v. United States,* 338 U. S. 84; *United States v. Rumley,* 345 U. S. 42.)

Here the Government failed to establish, as it was required to do, that the "copy of a transcript" was that of a *lawful* "U. S. Marine Court of Inquiry" (having legal existence") and that such copy was thus the "property of the United States", having *some* value, however slight, as the transcript of such a lawful court of the United States. The only evidence in the record justifies the exact opposite conclusion.

To paraphrase the language of this Court in *Dynes v. Hoover* (*supra*), *the law for convening and directing the proceedings of courts of inquiry having been disregarded, everything which was done was void.—"not voidable, but void"*; and *the "court and the officers" were "all trespassers."* They were not a "court of the United States" and the "transcript" was a valueless private report of a self-established group of unlawful trespassers, not "property of the United States" having *some* value.

VII.

The Court Erroneously Excluded Evidence of the Bad Reputation for Truth, Honesty and Integrity of The Government's Witness, Thompson, An Adjudicated Insane Man, and the Sole Witness Upon Whom the Prosecution Fundamentally Relied and Whose Testimony the Court Below Concedes Was "The Evidentiary Basis of the Jury's Verdict."

Petitioner called to the stand Captain J. B. Worley, former Long Beach Captain of Police and for twenty-five years the operator of a private detective agency [R. 350]. Captain Worley testified that he had employed Thompson from July 11, 1952 to May 6, 1953, when Thompson disappeared [R. 352]. He had discussed Thompson's reputation with various people in the community. He knew what Thompson's reputation for truth, honesty and integrity was in that period [R. 353]; "it was very bad". Without objection he testified that he would not believe Thompson under oath [R. 353]. In reply to an inquiry by the court, Worley testified that Thompson "stole a lot of money from me and a lot from other people in Long Beach" [R. 354]. On motion by the prosecutor the court struck *all* of Captain Worley's testimony [R. 354].

The trial court erroneously construed the law to be that testimony of bad reputation of Thompson was admissible only if the witness knew the reputation of Thompson at the time of the commission of the offense and *not at the time of trial.* The Circuit Court held that this reputation testimony was properly stricken by the trial court because: "The witness clearly stated he was testifying to a time after the finding of the indictment." In this respect the Circuit Court erred both as to the facts and as to the law. The reputation testimony covered the period from

July 11, 1952 to May 6, 1953 [R. 352]; the indictment was not returned until June 25, 1953 [C. Tr. 2]. Thompson, the witness, had only met the petitioner within two months before December 19, 1952 [R. 142].

Both the trial court and the court below erroneously construed the law applicable to the admissibility of reputation testimony. California Code of Civil Procedure, Section 2051, made this testimony relevant and admissible. The code section expresses a general rule of evidence applicable in the Federal Courts of the United States and generally recognized as a rule of evidence.

The testimony regarding Thompson's bad reputation was not only extremely important in the case at bar, it could have been decisive. As the court below correctly stated, Thompson's testimony was *"the evidentiary basis for the verdict of the jury"* and was *"the sole support of a considerable portion of the case for the prosecution."* If the Worley testimony as to the bad reputation of Thompson had not been stricken the jury might well have acquitted petitioner since the *"main framework of the case was laid by the testimony of Thompson"* and rested solely on Thompson's credibility.

The witness, Captain Worley, and Thompson both lived in Long Beach from July 11, 1952 to May 6, 1953. Captain Worley had talked with many people in the community about Thompson's reputation for truth, honesty and integrity, traits relevant to the issues involved here. Compare, *Michelson v. United States,* 335 U. S. 469, 483. He knew the reputation to be very bad.

In any event, reputation testimony as to a witness, regardless of when it is acquired, is relevant as to the truthfulness of the witness *at the time of testimony.* Prior

reputation and contemporary reputation testimony are, of course, competent inasmuch as they are relevant to the credibility of the witness *at the time of his testimony.* (See, *Wigmore—Evidence* (3rd Ed.) Vol. V, Secs. 1617 and 1618, at p. 491.)

What is involved is the credibility of Thompson at the time of his testimony. His ability to relate things truthfully at the time he is a witness is the question before the court and the jury.

In California, where the trial was held, the Code of Civil procedure, Section 2051, provides as follows: "A witness may be impeached by the party against whom he was called, by contradictory evidence or *by evidence that his general reputation for truth, honesty, or integrity* is *bad,* . . ." (Our emphasis). It will thus be seen that a witness may be impeached by testimony that his reputation for truth, honesty and integrity *is* bad. Rule 43, Rules of Civil Procedure for the United States, provides for the form and admissibility of testimony, and states:

> "In any case, the statute or rule which favors the reception of the evidence govern and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made."

As this Court stated in the *Gordon* case, 344 U. S. 414, 417: "Where, as here, the government's case may stand or fall on the jury's belief or disbelief of one witness, his credibility is subject to close scrutiny"; so in the case at bar where, according to the court below, *"the main framework of the case was laid by the testimony of Thompson"*, which *"was the sole support of a considerable portion of the case*

for the prosecution" and "the evidentiary basis for the verdict of the jury", to strike the reputation testimony of Captain Worley, discrediting the testimony of Thompson, was certainly prejudicial. "There is a presumption of harm arising from the existence of an error committed by a trial court against the party complaining, in excluding material evidence on a trial, especially before a jury." (*Crawford v. United States,* 212 U. S. 183, 203.)

Conclusion.

Each of the questions we have presented herein are of fundamental importance in the administration of criminal justice and this Court's supervisory control thereof and require the plenary consideration and determination of this Court. In the setting in which we have presented them, none of them have been passed upon, but should be passed upon, by this Honorable Court In the event the Court grants rehearing and grants certiorari in this case and to preserve our record, we ask leave to renew and reurge additionally each of the points raised in our original petition as though fully set forth herein.

In pointing out, also, the insufficiency of the evidence which was raised in our original petition, we failed to point out that in the instant case that question of its sufficiency was raised as a due process question which this Court will always re-examine to see if the trial procedure has been fair in the light of the many things set out in the original petition. (Justice Roberts in *Snyder v. Mass,* 291 U. S. 97.) This Court will always examine a record to see if the petitioner has been accorded a fair trial guaranteed by the due process clause of the Fifth Amendment to the Constitution. It was in this setting that we urged the Court to re-examine the evidence in this "bizzare" case.

This Court has said that no conviction should rest on a confession that is forced. *Chambers v. Florida,* 309 U. S. 227, or upon evidence secured by illegal search and seizure, *Boyd v. United States,* 116 U. S. 616; *Weeks v. United States,* 232 U. S. 383; *Silverthorne Lumber Co. v. United States,* 251 U. S. 385; *United States v. Lefkowitz,* 285 U. S. 452, nor by knowing use of perjured testimony, *Mooney v. Holohan,* 294 U. S. 103. Should a conviction rest on the testimony of an adjudicated insane witness, vouched for by the Government's production of him as a credible, competent witness?

No person's conviction and sentence to imprisonment and the probable termination of a legal career should rest upon such tenuous testimony as that of an insane man whose competency was not in the first instance determined by the trial court, nor was it determined by the jury under proper instructions as how to weigh the testimony of an insane man. It is shocking to the conscience of mankind; it is contrary to the fundamental principles of justice, which lie at the base of all of our institutions. (*Herbert v. Louisiana,* 27 U. S. 312; *Francis v. Resweber,* 329 U. S. 459; *Lisenba v. California,* 314 U. S. 219; *Snyder v. Massachusetts,* 291 U. S. 97; *Irvine v. California,* 347 U. S. 128.) As said in *Irvine v. California* regarding another situation, the situation here would be "shocking" if it were not admitted.

We pray for a rehearing and for certiorari.

Respectfully submitted,

MORRIS LAVINE.

Attorney for Petitioner.

Certificate of Counsel.

I, Morris Lavine, counsel for the petitioner, hereby certify that the petition for rehearing is filed in good faith and not for the purposes of delay, and that it is based upon fundamental questions of law and fact which were either not presented in the original petition, or not fully or adequately presented therein, and which require the supervisory control over criminal justice and the plenary consideration of this Honorable Court and is restricted to these grounds.

MORRIS LAVINE,
Attorney for Petitioner.

MOTION FILED AUG 2 1956

see #327

IN THE

Supreme Court of the United States

October Term, 1956

No. 243

GEORGE E. SHELLEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Motion for Leave to File Brief Amici Curiae on Petition for Writ of Certiorari and Brief.

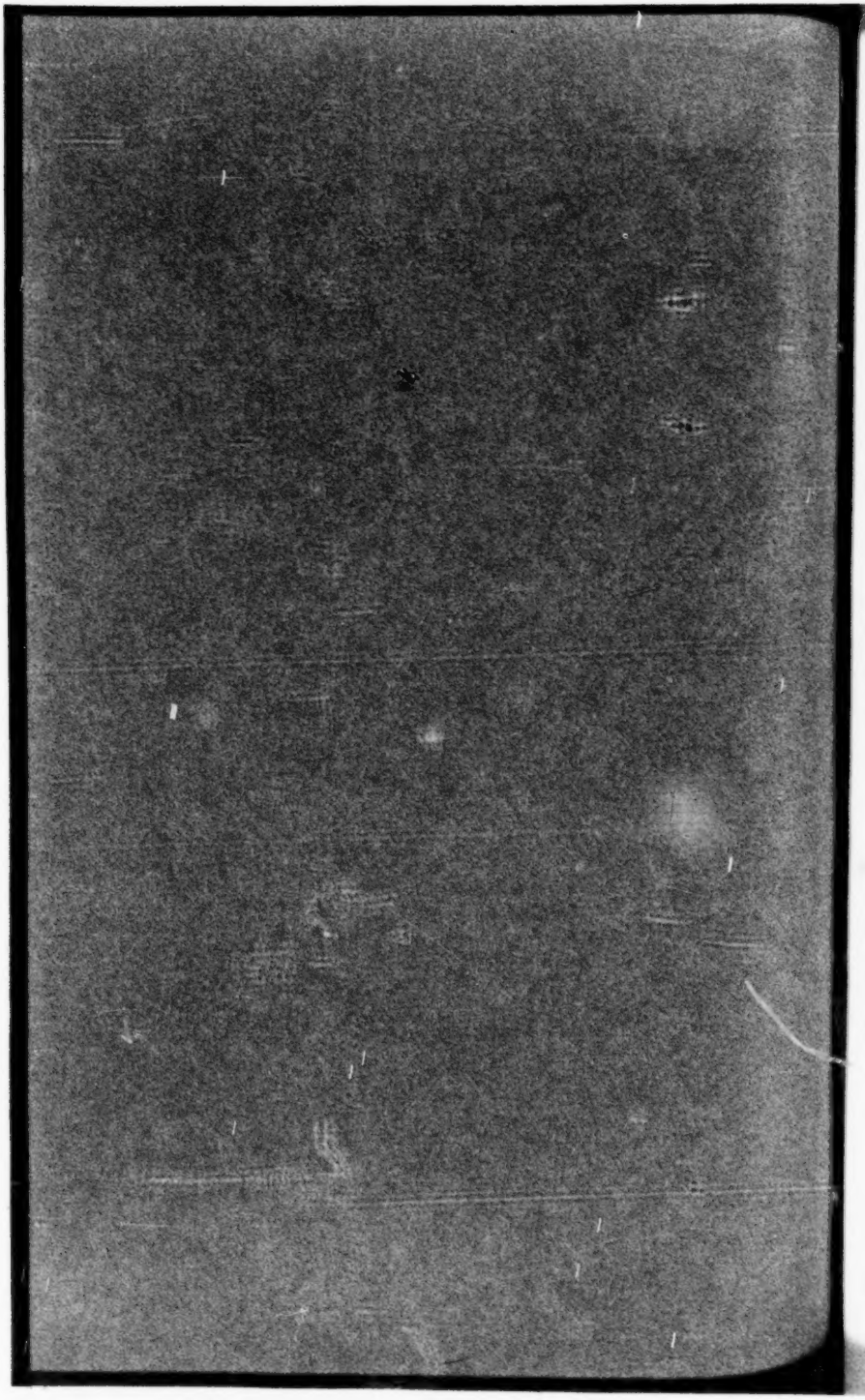
MYRON G. EHRLICH,
416 Fifth Street, N. W.,
Washington, D. C.

JAMES SUTHERLAND,
207 Security Building,
Fresno, California,

Counsel for Amici Curiae.

see #327

Parker & Son, Inc., Law Printers, Los Angeles, Phone MA. 6-9171.



SUBJECT INDEX

PAGE

Motion for Leave to File Brief Amici Curiae on Petition for Writ of Certiorari 1

Brief on Behalf of Amici Curiae 3

Statement 3

Argument 6

Point I. Public policy, as expressly enunicated by the Congress, forbids the influence of "command control" in military tribunals. That same policy should be upheld and enforced in the federal courts. The prosecution of civilian defense counsel herein arises out of an abuse and evasion of the aforesaid congressional policy and should be halted by the Supreme Court. This result can only be achieved by a grant of certiorari in the instant case 6

Point II. The independence of the bar, and the right and duty of civilian counsel to afford to military clients a full measure of legal representation in military tribunals, without reprisals by officials in command control, is in jeopardy. The preservation and protection of such independence requires a grant of certiorari in the instant case 10

Conclusion 14

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Armstrong v. Armstrong, 100 L. Ed. (Adv. Op.) 460	14
Gallagher v. Municipal Court, 31 Cal. 2d 784, 192 P. 2d 905	12
Girouard v. United States, 328 U. S. 61	11
Humphrey v. Smith, 336 U. S. 695, 69 S. Ct. 830, 93 L. Ed 986	7
United States v. Ferguson, 5 USCMA 68, 17 CMR 68	6
United States v. Gordon, 1 USCMA 255, 2 CMR 161	6
United States v. Green, 5 USCMA 610, 18 CMR 234	8
United States v. Hunter, 3 USCMA 497, 13 CMR 53	6
United States v. Isbell, 3 USCMA 782, 14 CMR 200	6
United States v. Littrice, 3 USCMA 487, 13 CMR 43	6
United States v. Long, 5 USCMA 572, 18 CMR 196	7
United States v. McMahan, 6 USCMA 709, 21 CMR 31	7, 8
United States v. Morelli, 4 USCMA 276, 15 CMR 276	8
United States v. Navarre, 5 USCMA 32, 17 CMR 32	6
United States v. Parker, 6 USCMA 75, 19 CMR 201	7
United States v. Whitley, 5 USCMA 786, 19 CMR 82	7
United States v. Zager, 5 USCMA 410, 18 CMR 34	7

STATUTES

Uniform Code of Military Justice (50 USC (Chap. 22) 551-736)	6
Uniform Code of Military Justice, Art. 32(b)	7
Uniform Code of Military Justice, Art. 38(b)	7
United States Code, Title 50, Sec. 613	7
United States Constitution, Sixth Amendment	7

MISCELLANEOUS

Canons of Professional Ethics of the American Bar Association, Sec. 15	8
Canons of Professional Ethics of the American Bar Association, Sec. 37	8
Cushman, Civil Liberty in Public Opinion in Safeguarding Civil Liberty Today (1945), p. 105	11
Manual for Courts-Martial (Naval Supp.), Sec. 0116	8
Stimson and Bundy, Active Service in Peace and War, Introduction, p. xxi	10

IN THE

Supreme Court of the United States

October Term, 1956

No. .....

GEORGE E. SHIBLEY,

Petitioner,

vs.

UNITED STATES OF AMERICA.

Motion for Leave to File Brief Amici Curiae on Petition for Writ of Certiorari.

The *amici* whose names are appended to the Brief herein, by their counsel, respectfully ask leave to file the within Brief *Amici Curiae* on behalf of the petitioner in the above entitled cause.

Counsel for the *amici* are familiar with the questions involved in the case and the scope of their presentation, and believe that there is need for additional argument on the relevant points set forth in the Brief annexed hereto.

The interest of *amici* in this litigation arises principally from the fact that they are all members of the Bar concerned with preserving the rights of civilian counsel in their representation of members of the armed forces before military tribunals and the independence of the Bar

generally as an aspect of the constitutional right of all persons to the effective assistance of counsel.

The brief annexed hereto is not a brief on the merits of the case, but is submitted prior to consideration of a petition for writ of certiorari to urge the Court to grant that petition. As responsible members of the Bar, we understand that the Court, under a heavy workload, must restrict its attention to issues of great importance. As practicing attorneys, we are profoundly concerned with the administration of justice and particularly with the public policies touching the advocate's functions in that domain. We stand united in our firm opposition to practices which tend to weaken or undermine the ability or will of an advocate to measure up to his great responsibility to his client and to society. We have joined together respectfully to invite the attention of the Court to the effect of the petitioner's conviction upon all attorneys who, in defense of accused clients, find it their duty vigorously to challenge or condemn the acts and practices of highly placed government officials. We urge that the questions presented for decision have a special and important relationship to the proper administration of justice and the law military, and that therefore certiorari should be granted.

Counsel for the petitioner have consented to the filing of the Amicus Brief but counsel for the United States has declined to give his consent.

Respectfully submitted,

MYRON G. EHRLICH,

JAMES SNEDEKER,

Counsel for Amici Curiae.

IN THE

Supreme Court of the United States

October Term, 1956

No. .....

GEORGE E. SHIBLEY,

Petitioner,

vs.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF ON BEHALF OF AMICI CURIAE.

Statement.

George Shibley, the petitioner, has been engaged in the practice of law in Long Beach, California, since 1935. In 1952, he was retained to and did represent one Master Sergeant Bennette, United States Marine Corps, in general court-martial proceedings at the Marine Air Base, El Toro, California. Convicted of the comparatively minor offense of transporting Marine personnel for hire in violation of existing regulations, the accused was sentenced to six months' confinement at hard labor, a fine, reduction in rank to that of private, plus discharge with a bad-conduct discharge. Petitioner vigorously, but in vain, pleaded with Marine officials for recognition and respect for the rights of the accused as set forth in the Uniform Code of Military Justice, took an appeal from the findings

and sentence of the court-martial, and with the aid of other counsel secured a reversal and completely cleared his client.

During the course of these proceedings, petitioner wrote a letter to the Commandant, United States Marine Corps, on behalf of his client, challenging the authority of the local Marine officials to proceed against his client, and making serious accusations against certain of such officials, including charges of failure to appoint selected available military counsel, of destruction and falsification of records, procurement of perjured testimony, and coercion of witnesses. Thereafter, the attention of local officials was focused upon the petitioner. He was deprived of the assistance of military defense counsel previously furnished, denied further access to law books at the Air Base, and was subpoenaed as a witness before a court of inquiry convened by the commanding general at the Air Base for the alleged purpose of investigating the derelictions which were the subject of the petitioner's accusations. The petitioner challenged the jurisdiction of the court of inquiry on the ground that it was convened to investigate the petitioner and that it was convened by an officer who was, in effect, the accuser, and on the further ground that with respect to the petitioner's accusations, the purported subject of inquiry, the officer who convened the court was himself an accused. Petitioner refused to answer various questions on various grounds, including refusal to disclose matters covered by the attorney-client privilege. After testifying for several days, petitioner believed he was excused as a witness. Two or three days later, the court of inquiry, without notice, issued a warrant of attachment for petitioner, had the petitioner arrested in his Long Beach office by four armed military policemen and forcibly taken to the Air Base at El Toro.

The court of inquiry charged petitioner with contempt, and at the instance of local military officials, petitioner was tried in the federal district court on a multiple count information; the court granted judgment of acquittal as to three counts, the jury acquitted petitioner on three counts and the three counts as to which no conclusion was reached were subsequently dismissed. Following the filing of the information, the local military officials then aided in procuring the indictment of petitioner on charges of various counts, all of which related to the disappearance of a carbon copy of the transcript of the proceedings of the court of inquiry. This copy of the transcript had been stolen by one Thompson, named as a co-defendant in the federal case, and the effort was to connect petitioner with this theft. Thompson, a mental patient who had been confined in three mental institutions, was hostile to petitioner; he had been deterred by petitioner from associating with a 15 year old girl upon whom, it was later discovered, Thompson committed statutory rape; this girl had been paroled in custody of petitioner's wife and had lived in petitioner's household; Thompson, it appeared, had stolen the transcript to send to a prominent columnist of a national newspaper syndicate. Almost seven months after his arrest, Thompson changed his not guilty plea to that of guilty, was released on his own recognizance, testified against petitioner, and went unpunished. His accomplice, a Marine corporal, also testified against petitioner and not only went unpunished but was given an honorable discharge from the service. Petitioner was the only civilian attorney involved in the court-martial proceedings, and was the only person connected with those proceedings who was subjected to punishment. He received a three-year sentence.

ARGUMENT.

POINT I.

Public Policy, as Expressly Enunciated by the Congress, Forbids the Influence of "Command Control" in Military Tribunals. That Same Policy Should Be Upheld and Enforced in the Federal Courts. The Prosecution of Civilian Defense Counsel Herein Arises Out of an Abuse and Evasion of the Aforesaid Congressional Policy and Should Be Halted by the Supreme Court. This Result Can Only Be Achieved by a Grant of Certiorari in the Instant Case.

In enacting the Uniform Code of Military Justice (50 USC (Chap. 22) 551-736), Congress atttempted to insulate the trial of accused persons from the wrongful influence of those in command, by enumerating certain rights of the accused, by forbidding unlawful interference and tampering, and by providing a punishment for noncompliance with procedural rules. The history of unlawful command influence and the importance attaching to it in the Congressional hearings on the Uniform Code are fully understood and appreciated by the United States Court of Military Appeals. *United States v. Littrice,* 3 USCMA 487, 13 CMR 43 (1953). That court has shown its determination to eliminate "command control" of the judicial process in the armed forces. Where any question of an unlawful attempt to influence the course of justice has arisen, all doubts have been resolved by that court in favor of the accused. *United States v. Gordon,* 1 USCMA 255, 2 CMR 161 (1952); *United States v. Littrice,* 3 USCMA 487, 13 CMR 43 (1953); *United States v. Hunter,* 3 USCMA 497, 13 CMR 53 (1953); *United States v. Isbell,* 3 USCMA 782, 14 CMR 200 (1954); *United States v. Navarre,* 5 USCMA 32, 17 CMR 32 (1954); *United States v. Ferguson,* 5

USCMA 68, 17 CMR 68 (1954); *United States v. Zager,* 5 USCMA 410, 18 CMR 34 (1954); *United States v. Whitley,* 5 USCMA 786, 19 CMR 82 (1955).

In a court-martial, the accused has a right to be represented by civilian counsel if provided by the accused, or by military counsel of his own selection if reasonably available, or by defense counsel duly appointed. The accused may have both selected counsel and appointed counsel. UCMJ, Art. 38(b). 50 USC Sec. 613; *United States v. Long,* 5 USCMA 572, 18 CMR 196 (1955). Furthermore, he has the right to counsel prior to the convening of a general court-martial and during the pretrial procedures. UCMJ, Art. 32(b). This latter right is a substantial protection. *United States v. McMahan,* 6 USCMA 709, 718, 21 CMR 31 (1956), citing *Humphrey v. Smith,* 336 U. S. 695, 69 S. Ct. 830, 93 L. Ed. 986 (1949), and *United States v. Parker,* 6 USCMA 75, 19 CMR 201 (1956). The accused is entitled, not simply to counsel, but to the "effective assistance of counsel." The right is the same basic right as that which is included in the Sixth Amendment (irrespective of the question whether that Amendment is applicable to military personnel). Encroachment thereupon has been held to constitute a lack of due process of law. ACM S-3514, Mathis (1952) 6 CMO 661, 666-667. The view of the United States Court of Military Appeals is that:

> "The uniformed accused, as well as his civilian counterpart, is justly entitled to receive from his attorney a full measure of assistance. . . . Defending counsel . . . has a solemn duty to defend unreservedly the interests of the accused he has sworn to protect, and fear of disfavor should not deter him from using all honorable means to protect his client's cause. No system of justice can flourish

> if the representation afforded an accused person is to be neglected because of fear of reprisal. Nor can military justice succeed if those . . . who must defend an accused inadequately protect him because they dare not assert every right guaranteed by the Code."

United States v. McMahan, 6 USCMA 709, 717-718, 21 CMR 31 (1956). Speaking of defense counsel, Section 15 of the Canons of Professional Ethics of the American Bar Association states: "No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty." This canon is quoted and embodied in the rules relating to justice in the naval service, rules which govern the United States Marine Corps as well as the United States Navy. Naval Supplement to Manual for Courts-Martial, Sec. 0116.

The attorney-client privilege, as embodied in Section 37 of the Canons of Professional Ethics of the American Bar Association ("It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment . . .") is respected in the military services as part of the public policy, and doubtful communications are treated as privileged. *United States v. Morelli,* 4 USCMA 276, 15 CMR 276 (1954); *United States v. Green,* 5 USCMA 610, 18 CMR 234 (1955).

Where defense counsel has been beset by officials' attempt to influence military tribunals in an unlawful manner, where counsel's zealous but legitimate efforts to protect the accused's interests have been thwarted, or where the accused's guaranteed rights have been denied, yet the accused has been convicted, the reviewing authori-

ties and courts within the military establishment have acted strongly to correct the injustice. Where the accused has requested the assignment of individual military counsel of his own selection, and the request has been denied despite the presence of the requested counsel and the absence of any circumstances indicating that he was not reasonably available, the findings and sentence have been reversed. ACM 6062, Hanson (1953), 8 CMO 671.

In the instant case, however, the conviction of the petitioner's client was reversed upon the merits of the court-martial record, and the treatment of his civilian counsel by the military superiors of the client did not come to the attention of the court-martial reviewing authorities. Command influence then took a new tack. Successful defense counsel was subjected to military investigation, military arrest, trial for alleged contempt, indictment, and trial in the federal district court. Such apparent persecution would not have been condoned by reviewing military tribunals, and should, in the interest of the preservation of consistent public policy, be carefully scrutinized by the United States Supreme Court. The criminal prosecution of this petitioner has a direct impact upon Congressional policy and, unless reversed, will lead to wide evasion and erosion of that policy.

POINT II.

The Independence of the Bar, and the Right and Duty of Civilian Counsel to Afford to Military Clients a Full Measure of Legal Representation in Military Tribunals, Without Reprisals by Officials in Command Control, Is in Jeopardy. The Preservation and Protection of Such Independence Requires a Grant of Certiorari in the Instant Case.

Lawyers must be prepared in the interests of their clients to risk resentment from those in high places. This is an occupational hazard which often can be avoided only by sacrificing duty and the ends of justice to expediency and self-interest. The obligations imposed upon lawyers by the Canons of Professional Ethics are designed not only to protect the interests of an individual client but also to preserve a society in which the rights of all citizens shall be maintained against aribtrary authority. They flow from the very essence of our concepts of the functions and limitations of a republican form of government.

We agree with Henry L. Stimson that ". . . without a bar trained in the traditions of courage and loyalty our constitutional theories of individual liberty would cease to be a living reality" and that "many countries possessing constitutions and bills similar to our own" have "nevertheless lost their liberties because they did not possess a bar with sufficient courage and independence to establish these rights. . . ." Henry L. Stimson, Introduction page xxi, on Active Service in Peace and War, Stimson and Bundy. What Erskine said with respect to England in 1792 remains true with respect to our country today: "From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in the court where

he daily sits to practice, from that moment the liberties of England are at an end."

It would seem to follow that lawyers have the obligation to address themselves to the courts, as we do by means of this brief, for the purpose of seeking to preserve and strengthen the role of lawyers as officers of the court. When it appears that prosecution may have been instituted and punishment may have been imposed upon a lawyer because of his vigorous defense of a client, the position of all citizens before the law is rendered less secure.

The Bar of our country has the proud tradition. Lawyers again and again have formed the front ranks of resistance to tyranny. We look back with pride upon the defense by John Adams and Josiah Quincy in 1770 of the British soldiers tried for participating in the "Boston Massacre," and upon Andrew Hamilton's defense of the printer Zenger when the latter was charged with the crime of criticizing his British Majesty. In more recent time we recall Charles Evans Hughes' defense of the ten expelled socialist assemblymen in New York, Homer Cummings' appearance for the pacifist Girouard (*Girouard v. United States,* 328 U. S. 61), and the appearance of many attorneys for the unpopular minority of the moment. It is then apparent that the record of the service rendered to the cause of freedom by American lawyers is a long and honorable one. "It stretches" says Professor Cushman, "all the way from James Otis, defending two Boston merchants against the tyrannical Writs of Assistance in 1761 down to Wendell Wilkie, defending the communist, William Schneiderman, in the Supreme Court in 1943." Cushman, Civil Liberty in Public Opinion in Safeguarding Civil Liberty Today, 1945, p. 105. For every such case which written history records either because of its prominence or that of its

counsel, there are thousands that are noted in no history books. Yet it is the proper handling of these cases involving little known causes and counsel of no great fame which is vital to the integrity of our judicial system. The lawyers who handle such cases must be afforded fearless advocacy. If, on behalf of the hundreds of Sergeants Bennette who yearly face the possibility of unjust persecution, resistance to high authority, military or civil, is weakened, erosion of the judicial process is begun. Lawyers and the courts should stand like flint against this. Not the lawyers alone but society has a "fundamental interest . . . in maintaining an independent bar." *Gallagher v. Municipal Court,* 31 Cal. 2d 784, 795, 192 P. 2d 905 (1948).

In recent times the danger arising from the failure to maintain these high standards of fidelity to the sworn duty of the Bar has aroused serious concern. The American Bar Association has found it necessary to stress "the rights and duties of defendants to the benefit of assistance of counsel and the duty of the bar to provide such aid even to the most unpopular defendants." Los Angeles Daily Journal, August 16, 1955. A similar resolution has been adopted by the Board of Governors of the State Bar of California. The American Bar Association's Special Committee on Individual Rights as Affected by National Security, stated in a report dated July 30, 1953: "The Bar looks back with pride upon occasions where this duty was nobly discharged. It must deplore and seek to overcome any obstacles which may prevent its discharge in the future." The conviction of petitioner on the record in this case seems to us to constitute such an obstacle.

If a case like that of petitioner is not subjected to the careful scrutiny of this Court, that which is strong and

good in the Bar's tradition will suffer and that which we deplore may well draw sustenance. For an attorney to be found guilty of a felony for allegedly conspiring to steal a transcript which he should have been handed as a matter of right, is itself a cause for some concern. When that conviction depends upon the testimony of a witness who has but recently been adjudged and confined as an incompetent, the gravity of the issue is increased. When that witness, an admitted thief with an apparent independent motive for the theft, is released on his own recognizance on the first day that his cooperation with the prosecution is made manifest, when he escapes all punishment after a plea of guilty for that and other undenied offenses, and when a Marine corporal who admittedly participated in the planning of the theft, is not even prosecuted, the conviction of petitioner and the three-year sentence meted out to him must cause serious alarm. When all this arises from a background of fearless and successful advocacy by petitioner involving legal attacks upon high officers, and when those officers cause his arrest by military police and initiate a series of criminal prosecutions against petitioner, we feel that lawyers should not remain silent. If we do, the next Sergeant Bennette may well find it impossible to obtain the kind of defense which it is our duty as members of the Bar to secure for him.

Our collective concern is with the proposition that the legal questions presented by the petition in this case be evaluated and considered in the light of its impact upon the functioning of lawyers and courts in the administration of full and equal justice to every man and woman in our land. We press upon the Court the view that the case in its entirety relates so significantly to the independence of the Bar and to the administration of justice that it merits more than "the inevitably cursory

consideration that is normally given in a case on the preliminary round. . . ." Mr. Justice Frankfurter, joining in the opinion of the Court in *Armstrong v. Armstrong,* 100 L. Ed. (Adv. Op.) 460, 464. Its importance, we believe, necessitates the careful consideration of the case which, as a practical manner, can only follow a grant of certiorari.

Conclusion.

It is urged on behalf of attorneys generally, by the undersigned as representative members of the Bar: first, that the established public policy of suppressing the unlawful influence over military tribunals of those in military command should be declared to include the suppression of such influence over prosecutions in the federal courts; second, that reprisals by those in military command against civilian counsel who have been successful in defending their clients in court-martial proceedings have a strong tendency to jeopardize the independence of the Bar; and, third, that consideration of either of the first two conclusions demands a grant of certiorari in the instant case.

Respectfully submitted,

MYRON G. EHRLICH,

JAMES SNEDEKER,

Counsel for Amici Curiae.

WILLIAM B. ENRIGHT,
611 Bank of America Bldg.,
San Diego, California;

DONALD E. FEELY,
11544 E. Whittier Boulevard,
Whittier, California;

NORMAN GOTTLIEB,
507 Heartwell Building,
Long Beach, California;

THOMAS D. GRIFFIN,
512 Times Building,
Long Beach, California;

EMMANUEL GYLER,
507 Heartwell Building,
Long Beach, California;

CHARLES K. HACKLER,
756 South Broadway,
Los Angeles, California;

RUSSELL L. HOFVENDAHL,
1114 Bank of America Bldg.,
San Jose, California;

ELDON J. KOORSTAD,
246 West Compton Boulevard,
Compton, California;

ROBERT E. KRAUSE,
414 Heartwell Building,
Long Beach, California;

DAVID I. LIPPERT,
629 South Hill Street,
Los Angeles, California;

CHARLES S. LITWIN,
914 Heartwell Building,
Long Beach, California;

ROBERT H. LUND;
320 Pine Avenue,
Long Beach, California;

JAMES MONROE,
800 North Broadway,
Santa Ana, California;

WILLIAM T. PILLSBURY,
312 Kennebec Building,
Long Beach, California;

PHILIP E. POPPLER,
1104 Security Building,
Long Beach, California;

HARRY T. SHAFER,
122 West Compton Boulevard,
Compton, California;

RAYMOND C. SIMPSON,
110 West Ocean Boulevard,
Long Beach, California;

WILLIAM O. WANZER,
914 Heartwell Building,
Long Beach, California,

Amici Curiae.

MORRIS ABRAHAM,
215 W. 7th Street,
Los Angeles, Calif.;

EPHRAIM ADAMS,
1905 W. San Carlos Street,
San Jose, Calif.;

MELBERT B. ADAMS,
681 Market Street,
San Francisco, Calif.;

JOSEPH L. ALTAGEN,
208 W. 8th Street,
Los Angeles, Calif.;

GEORGE T. ALTMAN,
233 S. Beverly Drive,
Beverly Hills, Calif.;

GEORGE R. ANDERSON,
240 Montgomery Street
San Francisco, Calif.;

NATHAN ASIMOW,
2024 W. 6th Street,
Los Angeles, Calif.;

JAMES ASTLE, JR.,
9371 Washington Blvd.,
Culver City, Calif.;

MICHAEL B. ATKINS,
25 Broad Street,
New York, New York;

ARTHUR AUERBACH,
504 Van Ness Avenue,
San Francisco, Calif.;

C. H. AUGUSTINE,
216 Orpheum Theatre Bldg.,
San Diego, Calif.;

ROBERT V. G. AUSTIN,
1023 Times Bldg.,
Long Beach, Calif.;

BEVERLY AXELROD,
704 Market Street,
San Francisco, Calif.;

WILLIAM L. BAKER,
15851 E. Whittier Blvd.,
Whittier, Calif.;

GEORGE H. BARNETT,
227 Bank of America Bldg.,
San Jose, Calif.;

SELMA B. BARNETT,
14416 Victory,
Van Nuys, Calif.;

FRANK S. BARRETT,
227 Bank of America Bldg.,
San Jose, Calif.;

KENNETH A. BARWICK,
7880 Broadway,
Lemon Grove, Calif.;

CHARLES A. BEARDSLEY,
1516 1st Western Bank Bldg.,
Oakland, Calif.;

J. E. BEAN, JR.
586 N. 1st Street,
San Jose, Calif.;

VICTOR H. BEAUZAY,
Commercial Building,
San Jose, Calif.;

FRANK B. BENNETT,
340 Bank of America Bldg.,
San Diego, Calif.;

LEON BENWELL,
4368 Village Road,
Long Beach, Calif.;

JERRY S. BERK,
3030 Temple Street,
Los Angeles, Calif.;

PERRY BERTRAM,
608 S. Hill Street,
Los Angeles, Calif.;

GEORGE C. BLACK,
3907 Duquesne Avenue,
Culver City, Calif.;

MAXWELL S. BOAS,
10568 Putney Road,
Los Angeles, Calif.;

LEONARD B. BOUDIN,
25 Broad Street,
New York, N. Y.;

HARRIET BOUSLOG,
63 Merchant Street,
Honolulu, T. H.;

ERNEST J. BRADY, JR.,
109 E. Impeiral Hgwy.,
Brea, Calif.;

WILLIAM M. BRANDON,
6829 Rita Avenue,
Huntington Park, Calif.;

FRANKLYN K. BRANN,
470 Flood Bldg.,
San Francisco, Calif.;

JOHN A. BRANT,
216 Bank of America Bldg.,
San Diego, Calif.;

H. GREGORY BRILLIANT,
756 S. Broadway,
Los Angeles, Calif.;

ROBERT L. BROCK,
1741 Ivar,
Hollywood, Calif.;

ALLAN BROTSKY,
785 Market Street,
San Francisco, Calif.;

BERTRAM J. BROWN,
524 B Street,
San Diego, Calif.;

GILBERT T. BROWN,
44—65th Place,
Long Beach, Calif.;

JOSEPH A. BROWN,
690 Market Street,
San Francisco, Calif.;

SAM BUBRICK,
322 N. Avenue 19,
Los Angeles, Calif.;

CARLYLE O. BUCKNER,
303 Orpheum Theatre Bldg.,
San Diego, Calif.;

THOMAS J. BURKE,
504 Granger Bldg.,
San Diego, Calif.;